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JUSTICE OF THE PEACE AND LOCAL GOVERNMENT REVIEW REPORTS, 1981

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145 J.P.

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COURT OF APPEAL

(Lord Denning, M.R., Shaw, L.J., and Brandon, L.J.)

R v SHEFFIELD CROWN COURT. EX PARTE BROWNLOW

Crown Court — Supervisory jurisdiction of High Court — Certiorari — Jurisdiction of Crown Court other than its jurisdiction in matter relating to trial on indictment — Order to supply to parties details of jury panel — Courts Act, 1971, s. 10(5)

Court of Appeal

The respondents, who were police officers, were committed for trial in the Crown Court on charges of assault occasioning actual bodily harm, and some two weeks before the hearing was due to take place they asked for an investigation of the jury panel on the ground that, having regard to the fact that they were police officers, "it would be in the interest of justice for the defence to be informed whether any members of the jury had criminal convictions". The Crown Court judge made an order that the chief constable should be supplied with a copy of the panel of jurors from which the jury was to be chosen and that he should supply to both prosecution and defence details of any criminal convictions recorded against any member of the panel. The chief constable moved in the Divisional Court for an order of certiorari to quash the order, but the Divisional Court took the view that they had no jurisdiction to deal with matter as it related to a trial on indictment within s. 10 (5) of the Courts Act, 1971, which provides "In relation to the jurisdiction of the Crown Court, other than its jurisdiction in matters relating to trial on indictment, the High Court shall have all such jurisdiction to make orders of mandamus, prohibition or certiorari as the High Court possesses in relation to the jurisdiction of an inferior court". On appeal,

Held: (Lord Denning, M.R. dissenting): any decision of the Crown Court which appertained to or arose in connexion with its jurisdiction to try cases on indictment came within the exclusory provisions of s. 10(5) of the Act of 1971; the proximity or remoteness of the relationship of the decision in question to the jurisdiction to try cases on indictment was wholly irrelevant; the Divisional Court rightly rejected the application for certiorari on the ground that it had no jurisdiction to entertain it; and the appeal would be dismissed.

Per Curiam: Any order or direction of a court designed to facilitate the selection of a jury by methods not directly provided for by the Juries Act, 1974, or recognised by the common law was unconstitutional.

Appeal by the chief constable of South Yorkshire against a decision of a Divisional Court of the Queen's Bench Division.

S D Brown and J Laws for the chief constable.

N Fricker QC, A McCallum and A Gittins for the respondents.

v

Cur adv vult

3rd March, 1980. The following judgments were delivered.

LORD DENNING, M.R.: Two police officers ('the respondents') have been charged with assault occasioning actual bodily harm. They were committed for trial at the Crown Court at Sheffield. The case was expected to be tried at the sittings in the week beginning 8th October,

Lord Denning, M.R.

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1979, and some time before that date, the officials of the court had made up the list of persons to be summoned as jurors. The list is called the jury panel. It contained the names and addresses of the persons. They had been duly summoned to attend the court. A fortnight before the sittings were due to begin, the solicitors for the respondents wanted the jury to be 'vetted' so as to see if any of them had any convictions. They wrote this letter to the county prosecuting solicitor:

'We have been advised by counsel to ask for an investigation of the jury panel in this case, having regard to the fact that the two defendants are police officers. It is thought that it would be in the interest of justice for the defence to be informed whether any members of the jury panel have criminal convictions.'

That letter was a plain request that the police should go through all their records, look up the names of all the persons on the panel, and see if any of them had any previous convictions of any kind, not only for serious offences which would disqualify them for jury service, but also for less serious offences, even down to trivial offences like driving too fast or without due care and attention, and also apparently for 'spent' convictions as well.

The county prosecuting solicitor refused to comply with this request. So on Thursday, 4th October, 1979, counsel went before the Crown Court judge who, it was anticipated, would try the case. He gave this ruling:

'I am always anxious that people should have, and feel that they have had, a fair trial ... I direct that the prosecution shall inform the defence whether any members of the jury panel have criminal convictions and give details of any such convictions. Of course, the details will be available to both sides. Plainly, any information which is given to one side in a matter like this must also be given to the other.'

The judge made his order on the chief constable of South Yorkshire. It was in these words:

'Upon hearing counsel for the defence and the prosecution it is hereby ordered that the chief constable of South Yorkshire be supplied with a copy of the panel of jurors from which the jury in this case will be drawn, and that he supply to the solicitors for the defence and for the prosecution full details of any criminal convictions recorded against any member of the said panel.'

The judge was told that the chief constable wished to test his decision in a higher court before the information was given. The judge said: 'I am happy to know that the matter is to be tested, because it is far better that the matter should be decided by those set over me than by me.'

The chief constable took immediate steps to test the validity of the judge's order. He applied for certiorari that the order be quashed. But, to the disappointment of the judge and of the chief constable the

Divisional Court held that they could not entertain the application. They made no pronouncement about jury vetting, for the simple reason that they had no jurisdiction in the matter. Nor indeed had any other court. If their decision is correct, there is no means open to any court in the land of testing the judge's order. The law on this important subject will have been settled by a Crown Court judge. Other judges will follow his example. And we shall have 'jury vetting' introduced into this country beyond recall, unless Parliament in two or three years' time takes a hand.

Counsel for the respondents has raised a point which had not been taken before. He suggested that this Court of Appeal had no jurisdiction to hear this appeal from the Divisional Court, and that any appeal lay to the House of Lords. He suggested that this was a 'criminal cause or matter' within s. 31(1)(a) of the Supreme Court of Judicature (Consolidation) Act, 1925, and he cited cases from the last century saying that those words should be given the widest possible interpretation. He relied especially on the language of Lord Esher, M.R., in *Ex parte Woodhall* (1), but those cases were all considered by the House of Lords in *Amard v Secretary of State for Home Affairs* (2). The words were there given a much narrower interpretation. Viscount Simon, L.C., said:

'If the matter is one the direct outcome of which may be trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so, the matter is criminal.'

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We applied that test in *R v Southampton Justices, ex parte Green* (3). So here. There is no possibility of the 'trial' of the chief constable, or of his possible punishment for an 'offence'. This is not a criminal cause or matter. We have jurisdiction to hear this appeal.

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Important as the issue is, it depends on two words in s. 10(5) of the Courts Act, 1971. The two words are 'relating to'. The section reads:

'In relation to the jurisdiction of the Crown Court, other than its jurisdiction in matters relating to trial on indictment, the High Court shall have all such jurisdiction to make orders of mandamus, prohibition or certiorari as the High Court possesses in relation to the jurisdiction of an inferior court.'

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That section excludes the jurisdiction of the Divisional Court 'in matters relating to trial on indictment'. So the question here is whether the judge's order for jury vetting was a matter 'relating to' trial on indictment.

So once again we have here the problem of statutory interpretation. It vexes us daily. Not only us, but also the House of Lords. Even the simplest words give rise to acute differences between us. Half of the

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(1) (1888), 52 JP 581; 20 QBD 832

(2) [1943] AC 147

(3) 139 JP 667; [1975] 2 All ER 1073; [1975] 3 WLR 277

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judges think the interpretation is clear one way. The other half think it is clear the other way. Notable instances in the House of Lords recently are *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd* (4) and *Nothman v London Borough of Barnet* (5). In each case three to two. It shows what a gamble it is. Change the constitution by one and you have a different result. No one can say whether the majority were right or wrong. As it happened in those two cases, they were right. They affirmed the unanimous decisions of the Court of Appeal. The same cannot be said of the latest excursion. It is in *Newbury District Council v Secretary of State for the Environment* (6). There the five judges in the House of Lords gave a different meaning to the one word 'repository' from that given to it by the Secretary of State, and the six judges below, including the Lord Chief Justice, the Master of the Rolls, two lords justices and two High Court judges. The five thought it clear their way. The six thought it clear the other way. The five prevailed, thus overruling the meaning which had been given to the word 'repository' by all the judges over the previous twenty years, and acted on by successive Secretaries of State: see *Horwitz v Rowson* (7), *Percy Trentham Ltd v Gloucester County Council* (8), and the *Newbury* case (6).

To get rid of these continuous conflicts, we should throw aside our traditional approach and adopt a more liberal attitude. We should adopt such a construction as will promote the general legislative purpose, such as I have advocated for years, from *Seaford Court Estates v. Asher* (9) to *James Buchanan & Co Ltd v. Babco Forwarding and Shipping (UK) Ltd* (4) and *Nothman v. London Borough of Barnet* (5); and such as Sir David Renton and his colleagues recommended in their valuable report on the Preparation of Legislation (Cmnd 6053 (1975)), and such as Lord Scarman inserted in the Bill he introduced into the House of Lords a little while ago, which unfortunately got no further. Put quite simply, perhaps too simply, whenever you have a choice between two interpretations, the choice is a matter of policy for the law: Which gives the more sensible result? It is not a semantic or linguistic exercise. Nine times out of ten you will find that judges will agree on what is the sensible result, even though they disagree on the semantic or linguistic result.

So far as commercial contracts are concerned, the House of Lords have already accepted that test, notably in *L Schuler AG v. Wickman Machine Tool Sales Ltd* (10) and *E L Oldendorff & Co GmbH v. Tradax Export SA* (11) where Lord Reid said:

(4) [1978] AC 141

(5) [1979] 1 All ER 142

(6) p.144 JP 249; [1980] 1 All ER 731

(7) 124 JP 424; [1960] 2 All ER 881

(8) 130 JP 179; [1966] 1 All ER 701

(9) [1950] AC 508

(10) [1973] 2 All ER 39; [1974] AC 235

(11) [1973] 3 All ER 148; [1974] AC 479

'Normally when language to be construed is ambiguous it is important to consider which interpretation leads to the more reasonable result, and when dealing with commercial matters it is I think specially important to consider which interpretation makes good sense commercially.'

Just as the Lords there looked for the interpretation which made good sense, so we should do also with regard to statutes.

To vindicate this approach I would draw attention to the recent case of *Express Newspapers Ltd v. McShane* (12). The word 'furtherance' was capable of two interpretations. One was that it was objective. The other that it was subjective. Five judges held that it was objective. Four that it was subjective. The choice between them was not a semantic or linguistic exercise. It was one of the policy of the law, or of public policy, as you might say, which the judges had perforce to decide. As between the two interpretations, which of the judges made the right choice and which the wrong? Subsequent events and subsequent comments have shown convincingly that the four in the majority of the House of Lords made the wrong choice. Yet, as they had the last word, no one can gainsay it. With this lesson before our very eyes, I would suggest that we should not delude ourselves into thinking that, when we are interpreting a statute, we have only to go by the literal meaning of the words, as we ourselves view it. Unless the words are only capable of one interpretation, we are really giving effect to the policy of the law; and in so doing we should always make the choice which good sense demands.

So I approach the two words 'relating to' fully appreciating that others may interpret them differently. They are two words in common use but they are not clear or specific. Like many English words or phrases they are flexible enough to be capable of two or more interpretations. You can see that by looking again at a case in this court about 'relations' and 'descendants': see *Sydall v. Castings Ltd* (13). So here, just as one person may be closely related to, or distantly related to, another: so may one matter be closely related to, or distantly related to, another. There is a choice before the judges: either give the words 'relating to' a wide interpretation or a narrow interpretation.

My choice is plain. I think the words 'relating to' should be interpreted as 'closely relating to'. So close indeed that the words 'relating to trial on indictment' should be read as equivalent to 'in the course of trial on indictment'. By giving the words this interpretation the law becomes sensible and consistent, and any erroneous order can be put right by a higher court. There is no gap left without a remedy. In this way, when a judge of the Crown Court makes an interlocutory order in the course of a trial on indictment, there is no appeal at that stage to a higher court. The trial judge should have the final word on such matters as adjournments, joint or several trials, particulars and so

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forth. The only remedy is this: in case a trial judge should make a mistake on an interlocutory matter, such as to cause injustice, the defendant can appeal against his conviction, and it will be taken into account at that stage: see *R. v. Grondowski and Malinowski* (14).

When a judge of the Crown Court makes an order, not in the course of a trial on indictment, but before it has started or after it has finished, preparatory to it or subsequent to it, there is no appeal from him to a higher court. But if his order is erroneous, there is recourse to the Divisional Court by way of mandamus or certiorari. The Divisional Court can intervene so as to put right that which has gone wrong.

At any rate in this case I think the words 'relating to' should be interpreted so as to be confined to 'closely relating to'. So interpreted the order made by the judge, for jury vetting, was not closely relating to trial on indictment. It was far too distant. Just see how distant it was. The jury panel is made up weeks before the sittings begin. It is not made up for any particular trial on indictment. It is made up of eighty or a hundred names of persons who are to be summoned to attend the court. It may be some hundreds in the Central Criminal Court, out of whom only twelve will be required to sit on any one trial on indictment. An order that every name on the list should be 'vetted' is far too distant to be considered as 'relating to trial on indictment'. It is preparatory to trial on indictment, not relating to it.

My conclusion is that the order made by the judge here was not a 'matter relating to trial on indictment', and that it can be reviewed by the court by the prerogative writ of certiorari.

Even if I am wrong about this, however, I think we should go on to express our view as to the correctness of the judge's order, just as we did in *R. v. Smith* (15). The chief constable has told us that, unless the order is reversed, he will feel bound to comply with it, it having been made by a judge of the Crown Court. And this in a case where the judge himself wishes the order to be considered by a higher court, and the chief constable desires it also. If we do think the judge was wrong, we should say so, because the order can then be put right quite easily. The chief constable can apply to the judge and ask him to set aside his order or at any rate to stay his order so that it should not be obeyed, and no doubt he would do so.

It is important to consider the nature of the order made by the judge. It is an order made on a public officer, the chief constable of South Yorkshire, on a matter relating to the performance of his public duties. The chief constable is not a party to any trial or cause pending before the judge. Yet an order is made on him, an order which is in the nature of a mandamus commanding him to conduct a 'jury vetting'. The only court which in the old days could issue a mandamus was the Court of King's Bench, consisting of the Chief Justice and three puisne judges: see 3 Blackstone's Commentaries 110. Nowadays the only court which can issue it is the Divisional Court. They are the only judges who can issue writs of mandamus or certiorari against public auth-

(14) 110 JP 193; [1946] 1 All ER 559; [1946] KB 369

(15) 138 JP 257; [1947] 1 All ER 651

orities. But I have never known a High Court judge, let alone a circuit judge, issue such an order. I think the judge here had no jurisdiction whatever to make this order on the chief constable.

There are two rival philosophies here. One philosophy says that the parties to a dispute ought to know whether the jurors are suitable to try the case. They ought to have access to the antecedents of the persons on the panel so that they may be able to object to those who are unsuitable to sit in judgment. That philosophy prevails in the United States of America. So much so that the parties in that country can cross-examine the potential jurors before they are sworn, not only about their previous convictions but also on their occupations, or their views on this matter or that which may arise in the course of the hearing, so as to see if they are prejudiced in any way.

That philosophy has never prevailed in England. Our philosophy is that the jury should be selected at random, from a panel of persons who are nominated at random. We believe that twelve persons selected at random are likely to be a cross-section of the people as a whole and thus represent the views of the common man. Some may be moral. Others not. Some may be honest. Others not. Some may be bad drivers with many convictions for motoring offences. others may not have a single thing against them. The parties must take them as they come. There are a few exceptions. Some persons are disqualified. Thus, if a man has served three months in prison during the last ten years, he is disqualified. Another may be banned because the prosecution has asked that he 'stand by for the Crown'. Yet another because the defence have exercised their right of peremptory 'challenge'. But subject to these exceptions, the principle of English law is that jurors should be selected at random. This principle was so well observed when I was at the Bar, and when I was sitting as a judge of first instance, that I do not remember a single 'challenge' or a single 'stand by for the Crown'. That seems to have been the experience of Lord Devlin also, for in his book *Trial by Jury* (1956, pp.29, 35), he says that the right of challenge has fallen into disuse and that challenge for cause is obsolescent.

In recent times, however, there has been a change. Some prosecuting authorities seem sometimes to have searched through the criminal records and the records of the Special Branch, checking to see if any of those on the jury panel have anything entered against their names; and then, if they think any one of them is unsuitable, to require him to 'stand by for the Crown'. This is called a 'jury check' or 'jury vetting'. In the House of Commons last week the Attorney-General disclosed that up till last year the Northamptonshire police were checking all jury panels against Criminal Record Office records. This information was passed on to prosecuting counsel. (See 979 HC Official Report (5th Series) (February 25, 1980) col.948). This sort of thing can be done without anyone outside the police force knowing anything about it. I rather think the two police officers here had something of that kind in their mind. They may have thought to themselves: 'The police may make a check on the criminal records of the jury panel. So why should we not see it as well?'

Now I would express my view on it. To my mind it is unconstitutional for the police authorities to engage in 'jury vetting'. So long as a person is eligible for jury service, and is not disqualified, I cannot think it right

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that, behind his back, the police should go through his record so as to enable him to be asked to 'stand by for the Crown', or to be challenged by the defence. If this sort of thing is to be allowed, what comes of a man's right of privacy? He is bound to serve on a jury when summoned. Is he thereby liable to have his past record raked up against him, and presented to prosecuting and defending lawyers who may use it to keep him out of the jury, and, who knows, it may become known to his neighbours and those about him? Furthermore, as a matter of practical politics, even if jury vetting were allowed, the chances are a thousand to one against any juror being found unsuitable and, if he should be, the chances of his being on any particular jury of twelve, so as to influence the result, are minimal, especially in these days of majority verdicts.

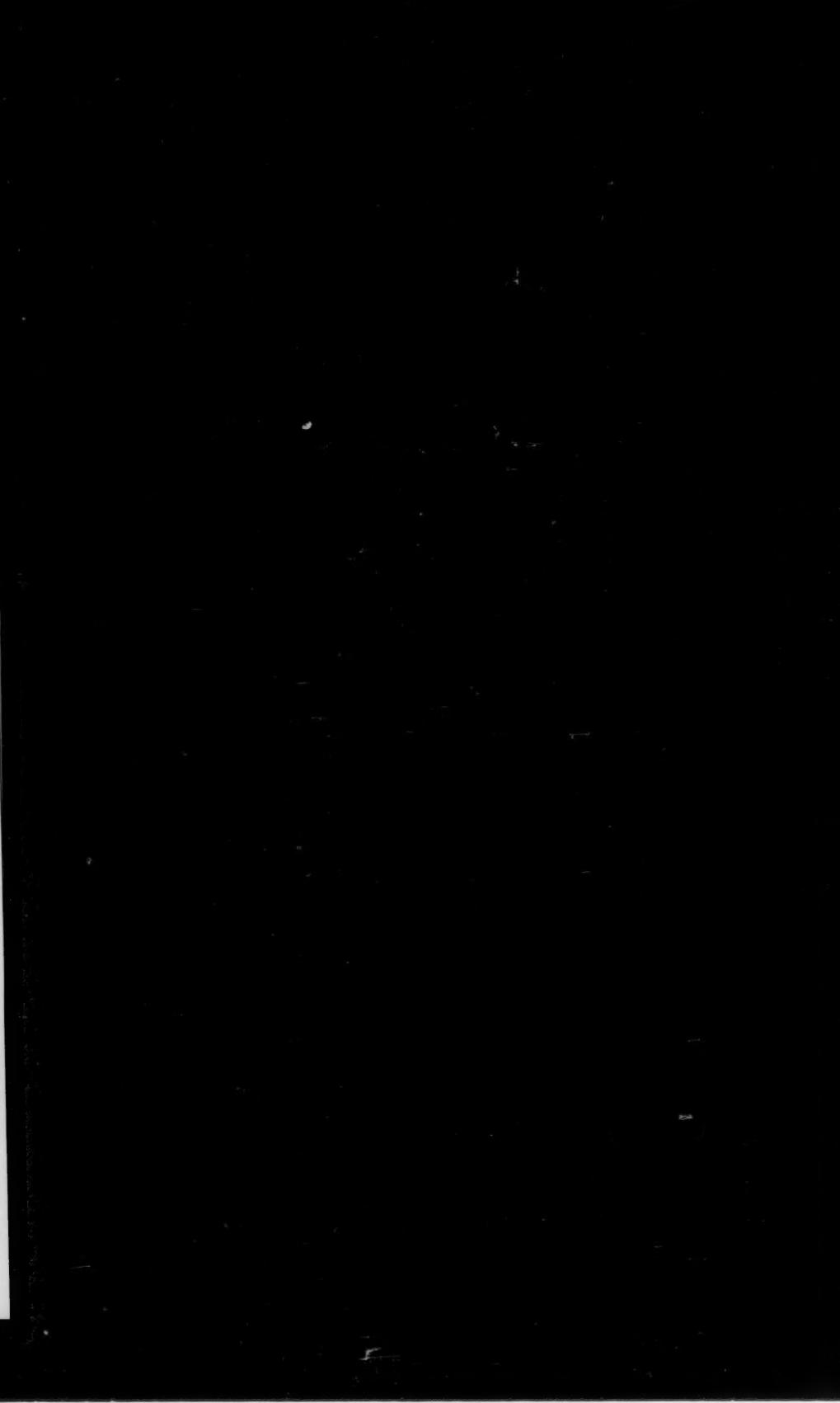
Counsel for the respondents has reminded us that a trial judge often himself makes a few inquiries of a juryman. I agree. I have done it myself. If a juryman, when he comes to take the oath, cannot read the words on the card, or cannot hear what is being said, I have invited him to stand down. That is perfectly legitimate. The judge is in charge of the trial, and is there to see fair play. But that is altogether different from anything in the nature of jury vetting.

The recent uprise of 'jury vetting' gave rise to so much concern that the Attorney-General in 1975 introduced guidelines. These only permit jury vetting in very rare cases and then only with the express permission of the Attorney-General. Since 1975 there have been only 25 cases notified in which there has been a jury check. These have been fourteen serious offences involving a political element, and eleven serious gang cases. I will assume, for present purposes, that the Attorney-General's guidelines are legitimate. But, even so, the order made by the judge here is far outside the guidelines. The offence of assault occasioning actual bodily harm ranks as a minor one in the catalogue of offences. If there is to be 'jury vetting' in this case, the door would be open to jury vetting in every case.

Those are the reasons why I think the order of the judge was bad. I think that we have jurisdiction to quash it and should do so. But, even if we have no jurisdiction to quash, I hope that those concerned will take heed of what we say, and apply to the judge to reverse his order. He surely can, even if nobody else can.

SHAW, L.J.: In the course of the submissions addressed to us by counsel for the chief constable when opening this appeal I intervened to inquire whether an appeal lay properly to this court. Counsel who appeared on the other side did not then take up or pursue the question of jurisdiction but developed his case on the merits. This morning, after reflection and research when the appeal stands for judgment, he has sought to argue that this court has no jurisdiction as the subject-matter of the appeal is a criminal cause or matter. He has at least persuaded me to repent on my intervention. The view which I adopt without full argument is that the subject-matter of this appeal, while it is ancillary and collateral to a criminal cause or matter, may not fall within the scope of such matters so as to require an appeal to be taken direct to the House of Lords.

Lord Denning has in his judgment recounted the course of events which has brought this matter before this court by way of appeal from





the Divisional Court. It raises a question of construction in regard to s. 10 of the Courts Act, 1971. By sub-ss.(2) and (3) of that section it is provided that any decision of the Crown Court may be questioned by any party to the proceedings on the ground that it is wrong in law or is in excess of jurisdiction, and that the procedure in questioning any such decision shall be by applying to the Crown Court for it to state a Case for the opinion of the High Court. Subsection (5) of the same section provides that in relation to the jurisdiction of the Crown Court the High Court shall have jurisdiction to make orders of mandamus, prohibition and certiorari in the same way that the High Court has in relation to the jurisdiction of an inferior court.

Thus the Act preserves a general supervisory jurisdiction in the High Court over decisions of the Crown Court. There is, however, an important exception which I have so far omitted. That jurisdiction is excluded in respect of any judgment or decision relating to trial on indictment, and in particular the power to make orders of mandamus, prohibition and certiorari does not exist in relation to the jurisdiction of the Crown Court in matters relating to trial on indictment. The question that arises is: What is meant by and comprised within the phrase 'matters relating to trial on indictment'? With all due regard to the broad principles of interpretation which have been stated by Lord Denning and applied by him in his analysis of this phrase, I cannot for myself see that the matter admits of real argument. It seems plain that any decision of a Crown Court which appertains to or arises in connection with its jurisdiction to try cases on indictment comes within the exclusory provisions contained in sub-ss.(1) and (5) of s.10 of the 1971 Act. The closeness or remoteness of the relationship of the decision in question to the jurisdiction to try cases on indictment is wholly irrelevant. It is the fact that the decision is so related to or arises in connection with trial on indictment that excludes it from the supervisory jurisdiction of the High Court. Neither sub-s.(1) nor sub-s.(5) of s.10 refers to 'a trial on indictment'. The phrase used is 'trial on indictment' which is a general reference not to a specific event or occasion but to a jurisdiction. Any decision as to a matter which arises out of or incidentally to or in the course of that jurisdiction whether it relates to a proximate trial or a remote one falls, as I see it, inescapably and inevitably into the immunity from review by the High Court.

Apart from the basic question of construction, there are formidable historical and practical justifications for this immunity. The Courts Act, 1971, abolished the courts of assize and the courts of quarter sessions. It established in their place the Crown Court which embodied both their jurisdictions. One was that of a superior court of record while the other was that of an inferior court. The Crown Court is declared by s. 4 of the Act to be a superior court of record, but its composite jurisdiction is still subject to the historical distinctions which existed before the Act came into operation. In its jurisdiction relating to trial on indictment, the Crown Court is the direct heir of the assize courts wherein the judges held the commission of the Sovereign to hold courts of general gaol delivery and of oyer and terminer. It would have been a derogation of their status and function in this judicial office of high consequence to be subject to the review of any court. The verdict of a jury if adverse to an accused might be reviewed

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in the Court of Criminal Appeal when that court was created by the Criminal Appeal Act, 1907, which made possible appeals against conviction or sentence. Apart from this statutory intervention there was only a consultative recourse to the Court for Crown Cases Reserved. The authority of judges of assize in the trial of cases on indictment was paramount and their decisions could not be questioned. Nor can the authority of Crown Court judges be questioned now in matters relating to their jurisdiction to try cases on indictment. Theirs must be not only the first but also the last word. A judge of assize could revoke or review or modify any order or decision he had made before the trial of an accused had been finally disposed of, but he was not subject to external oversight. It would have been inconsistent with the status and dignity of judges who presided over and controlled the trial of persons indicted for criminal offences to be subject to external control at every stage from committal until verdict. It would be no less invidious and inappropriate in the case of a judge of the Crown Court in the discharge of those same functions which have devolved on him. On the practical side, if decisions made by a judge of the Crown Court as to matters which are related to trial on indictment were subject at any stage to review by the High Court, the trial of a particular cause might be interminably delayed by incidental applications which could then be taken to the High Court by way of Case Stated or an application for judicial review.

The 1971 Act does not, in s. 10, make reference to matters closely or remotely related to trial on indictment. It is general and unspecific in this regard. It is difficult to think of any matter more closely related to trial on indictment than an order which may, in due course, affect the composition or constitution of a jury which will try alleged offenders already committed for trial.

In my judgment, therefore, the Divisional Court rightly rejected the application before it on the ground that it had no jurisdiction to entertain it and I would dismiss this appeal.

It is accordingly irrelevant to express a view as to the propriety of the order made by the circuit judge save that he has invited the guidance of a higher court in a matter of general public concern. I share the view of Lord Denning that any order or direction of a court designed to facilitate the selection of a jury by methods not directly provided for in the Juries Act, 1974, or recognised by the common law is unconstitutional. That Act incorporates, by way of consolidation, various enactments, to which must be added, so far as not affected by statute, the operation of the common law as to the summoning and empaneling of jurors. It declares the electoral register to be the basis of jury selection (see s. 3); it states how the panels of persons summoned as jurors should be prepared and what information should be included in those panels (see s. 5); and by sched. 1 it declares what classes of persons are ineligible to serve (see Part II). Apart from these provisions determining the composition of juries, there is the final opportunity conferred on an accused to challenge jurors at the outset of a trial on indictment (see s. 12). To this must be added the right of the Crown to require that any juror called at a trial should 'stand by' so that he will not serve on the jury then empanelled as long as some other juror is available to take his place.

It is obvious that the prosecution which has facilities for access to criminal records may in relation to any trial seek information which will enable them to decide whether to ask for a 'stand by' in respect of anyone on a jury panel who appears to them to be undesirable or untrustworthy as a juror. This element of undesirability or untrustworthiness would in the eyes of a prosecuting authority consist of something which indicated that a prospective juror might be ill disposed to authority or well disposed to criminals. There would thus supervene on the process of natural selection devised by the Juries Act, 1974, and supplemented by the common law a process of artificial selection derived from the special knowledge available to prosecuting authorities. It needs no elaborate argument to demonstrate that this user of such special knowledge would be an abuse as being contrary to the spirit and principle of jury service. It is possible to conceive of very special cases where the protection of the interests of the public at large demands that such knowledge should be sought and used. Even then it should not be sought or used without the sanction of the Attorney-General who is ultimately responsible for the conduct of prosecutions by way of indictment.

Such a procedure should not be adopted merely because it might reinforce a prosecution by excluding from a jury persons who might be anti authority or pro an accused. The Juries Act, 1974, makes statutory provision as to information which should appear on the jury panel. The courts should not in my view lend their aid to the extraction of further information by making orders in that regard. Nor would it be justified in the interests of individual persons accused on indictment. Such persons could not be precluded or prevented from pursuing their own inquiries as to the antecedents of those whose names appeared on a jury panel. Such inquiries, however, would have to be conducted so as not to harass or intimidate; and a court should not add its authority to or aid such inquiries by making orders of the kind made in this case by the circuit judge. It is an order which he may wish to reconsider with a view to its revocation, for he is entitled to review it and to rescind it. It is especially undesirable to make any such order because the accused are police officers. It puts them in a special category of accused who are given a facility not accorded to others who face trial on indictment and to the public it may appear, albeit without justification, that it shows some measure of partiality to police officers as distinct from other subjects.

Moreover it is necessary to ensure that those called to discharge the important duty of sitting on a jury in a criminal trial are left to give a true verdict according to the evidence free from any apprehension or disquiet as to the disclosure of some matter which may be discreditable or embarrassing to them. Apart from the exceptional cases I have indicated, jurors must not be exposed to prodding or probing if they are to discharge their function fearlessly and impartially.

BRANDON, L.J.: The Divisional Court was of the opinion that reviewing the order of his Honour Judge Pickles complained of in this case would involve reviewing the jurisdiction of the Crown Court in a matter relating to trial on indictment, that the Divisional Court's jurisdiction to do this was excluded by the express exception con-

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tained in s. 10(5) of the Courts Act, 1971, and that it was accordingly bound to dismiss the application. I agree with the opinion of the Divisional Court on these matters, and feel bound, therefore, to dismiss this appeal.

It may be that the appeal ought in any case to be dismissed on a preliminary ground, namely that it is an appeal from a judgment of the High Court in a criminal cause or matter, and that the jurisdiction of the court to entertain it is therefore excluded by s. 31(1)(a) of the Supreme Court of Judicature (Consolidation) Act, 1925. This point was, however, raised at so late a stage in the proceedings before us, and argued so shortly, that I do not feel able to express a concluded opinion on it.

Since I think that there is no jurisdiction to review the order complained of, I prefer not to express any opinion on the way in which the case should be decided if such jurisdiction existed. I would, however, make two observations of a general character about the practice of jury vetting. First, I have serious doubt whether there should be any jury vetting at all, either by the prosecution or by the defence. Secondly, if jury vetting is to be permitted to the prosecution in certain categories of cases, however and by whomsoever those categories may be defined, it hardly seems just that it should not be permitted to the defence in any categories of cases at all.

Appeal dismissed.

Solicitors: Director of Public Prosecutions; Barrington Black, Austin & Co., Leeds (for the respondents).

Reported by G.F.L. Bridgman, Esq., Barrister.

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R v HUCKLEBRIDGE
ATTORNEY-GENERAL'S REFERENCE (NO 3 OF 1980)

Firearm – Need for certificate – Shot gun – Rifle converted to smooth bore – Firearms Act, 1968, s. 1(3)(a).

Court of Appeal

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The appellant was convicted on one count in an indictment of possessing a rifle without a firearm certificate contrary to s. 1 of the Firearms Act, 1968, and was acquitted on another count of a similar charge relating to another gun. The latter gun was a Lee-Enfield rifle which had been converted to smooth bore by the rifling being reamed out and had been re-chambered to take .410 shot gun cartridges, but it was still capable of firing .303 cartridges although it would not be so accurate as it originally was and its range would be very much reduced. The gun in respect of which the appellant was convicted had been converted to smooth bore by the same process as the other gun, but it had not been re-chambered to take shot gun cartridges. It was still capable of firing .203 cartridges with the same loss of velocity and accuracy as the other gun.

By s. 1 of the Firearms Act, 1968, it was an offence for a person to have in his possession a firearm without a certificate "except a shot gun (that is to say a smooth bore gun with a barrel not less than 24 inches in length) not an air gun".

On the appellant's appeal against his conviction and in answer to a reference by the Attorney-General,

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Held; that both guns were shot guns within s. 1(3)(a) of the Act of 1968; accordingly the appellant's conviction would be quashed, and, in answer to the Attorney-General's reference, that it was possible so to adapt a Lee Enfield rifle, admittedly a firearm within s. 57 of the Act requiring a certificate, so as to exclude it from the necessity for a certificate by reason of s. 1(3)(a) of the Act.

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Appeal by David William Hucklebridge against his conviction at Portsmouth Crown Court of possessing a rifle without a firearm certificate contrary to s.1 of the Firearms Act, 1968, and a Reference by the Attorney-General.

S Parish for the appellant in the appeal and the respondent to the reference.

B Leary QC and J Tabor for the Crown in the appeal and the Attorney-General in the reference.

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LORD LANE, C.J., delivered the following judgment of the court:
On 19th July, 1979, at the Crown Court at Portsmouth, the appellant, (who has indicated his lack of objection to his name being published, this being an Attorney-General's reference) was convicted on count 2 in the indictment with which we are concerned, charging him with possessing a rifle no P39869 without a firearm certificate, contrary to s. 1 of the Firearms Act, 1968. He was, on the judge's direction, found not guilty on count 1 of the indictment of possessing a rifle

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no FB20954 without a firearm certificate contrary to the same section. He was sentenced to a fine of £20 or one month's imprisonment in default in respect of the count of which he was found guilty, namely count 2. He had originally pleaded not guilty to that count, but in the light of a direction by the judge he, on advice, changed his plea. Consequently there is one conviction and one acquittal, with both of which, rather unusually, this court is now concerned. We are concerned with the conviction because on a point of law the appellant appeals against that conviction. We are concerned with the acquittal because there has been a reference by the Attorney-General to this court in respect of the acquittal, both, of course, arising out of the same trial.

It is necessary to describe the two guns with which we are concerned. The gun in count 1 was a Lee-Enfield rifle, which had been converted to smooth bore by the rifling being reamed out and had been re-chambered to take .410 shot gun cartridges. But it is correct to say that it was still capable of firing .303 cartridges, though, owing to the obvious increase in bore, it would no longer be so accurate as it originally was, nor would the range of the rifle be the same; it would be very much reduced. The evidence was that it would be lethal up to about 100 yards. It had been reprooved at the Birmingham Proof House. The gun in count 2 had also been a Lee-Enfield .303 rifle. It had been converted to smooth bore by the same process as that in respect of the first count, but this gun had not been re-chambered to take shot gun cartridges. It was still capable of firing .303 cartridges with the same loss of velocity and accuracy as the other gun. It had been reprooved as a smooth-bore gun, but could not, as I say, fire shot gun cartridges.

The facts were not really in dispute and the judge was called on, as a matter of submission at the close of the expert evidence as to the guns, to decide whether or not the re-chambered gun had become a shot gun within the exception of s. 1(3)(a) of the 1968 Act so that a firearm certificate was not required in respect of it. So far as that gun was concerned, the judge ruled in favour of the appellant.

The appellant appeals against his conviction on count 2. He has a certificate of the judge in respect of that appeal, although such a certificate was not necessary, this appeal being on a point of law. The Attorney-General refers this matter in respect of count 1 to this court, asking the court to rule on the following:

'Whether it is possible so to adapt a Lee Enfield rifle, which has admittedly been a firearm within the definition of s. 57(1) of the Firearms Act, 1968, requiring a firearm certificate pursuant to s. 1(1) of the same Act so as to exclude the said firearm from the necessity for such a certificate by reason of s. 1(3)(a) of the same Act.'

It is necessary therefore to consider the various statutory provisions which are designed to cover this situation. I turn accordingly to the 1968 Act. Section 1 reads as follows:

'(1) Subject to any exemption under this Act, it is an offence for a person — (a) to have in his possession, or to purchase or acquire,

a firearm to which this section applies without holding a firearm certificate in force at the time, or otherwise than as authorised by such a certificate . . .

'(3) This section applies to every firearm except — (a) a shot gun (that is to say a smooth-bore gun with a barrel not less than 24 inches in length, not being an air gun) . . .'

The question in this case, or put more accurately the two questions in this case, depend entirely on the interpretation to be put on those words in s. 1(3)(a).

In subs. (4) of s. 57 of the 1968 Act shot gun is interpreted as follows:

"shot gun" has the meaning assigned to it by s. 1(3)(a) of this Act and, in ss. 3(1) and 45(2) of this Act and in the definition of "firearms dealer", includes any component part of a shot gun and any accessory to a shot gun designed or adapted to diminish the noise or flash caused by firing the gun.'

Consequently that interpretation section in a word refers a person desirous of having a definition of shot gun back to s. 1(3)(a), namely 'a shot gun (that is to say a smooth-bore gun with a barrel not less than 24 inches in length, not being an air gun)'.

The contention of counsel for the appellant is simple. He submits that those two sections taken together, namely, ss. 1 and 57, make it perfectly plain that the words in parenthesis in s. 1(3)(a) are, for the purposes of this Act, a definition of what the Act means by 'shot gun'. He goes on to submit that these two guns, each of them, although originally Lee-Enfield rifles properly so called, have ceased to be Lee-Enfield rifles properly so called and have become smooth-bore guns with barrels not less than 24 inches in length. That being the case, says counsel, they are plainly within s. 1(3)(a) and consequently do not require a firearm certificate. Accordingly, in his submission, the appellant should not only have been acquitted on count 1 but he should have been acquitted on count 2 as well.

This matter has been considered by the Divisional Court in *Creaser v Tunnicliffe* (1). The circumstances in that case are summarised in the headnote to the report as follows, in the Weekly Law Reports:

'Both the defendants collected firearms and both held a number of firearm certificates for specified guns and a shot gun certificate (which covered all shot guns in the certificate holder's possession). They had in their possession certain rifles without firearm certificates from which they had removed the rifling but the gun could still discharge the same ammunition as before the alteration. In respect of those guns, informations were preferred against the defendants that they were in possession of a firearm otherwise than as authorised by a firearm certificate, contrary to s. 1(1)

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of the Firearms Act, 1968. The justices rejected the defendants' contention that the removal of the rifling had the effect of altering the weapon to a smooth-bore gun within the definition of a shot gun in s. 1(3) of the Act. They held that, except in the case of certain antique guns, the defendants required firearm certificates and had committed offences under s. 1(1) of the Act.'

The defendants appealed against that conviction. The Divisional Court dismissed the appeal, but Lord Widgery, C.J., dissented and held that in his view the appeal should succeed. It was held by the majority

'that a rifle from which the rifling had been removed could still be used as a rifle, albeit with a lesser degree of accuracy, and it remained a rifle and, therefore, a firearm as defined by s. 57 and subject to the provisions of s. 1(1) of the Act.'

It seems to this court that what impression the weapon makes on the court, namely does it impress the court as being a rifle or does it impress the court as being a shot gun, is an immaterial consideration. What the court has to consider, and I do not apologise for repeating it, is the definition in s. 1(3)(a).

This court, with respect to the majority in *Creaser v Tunnicliffe* (1), finds the reasoning of Lord Widgery compelling. I cite a passage from his judgment:

'When one goes back to examine the circumstances in which a firearm may be possessed without a firearm certificate, which means going back to s. 1 of the 1968 Act, one is immediately struck by the fact that the broad distinction drawn between one firearm and another firearm is that the smooth-bore weapon (popularly called a shot gun) goes into one class, and all the rest go into another. Thus all the rifles are in a class described by s. 1. The reason must be clear enough. It is because the element of risk, danger and lethal quality which a rifle has when compared to a shot gun is very different. Parliament no doubt had in mind that people may have a legitimate excuse for holding shot guns but not have any excuse for saying they required a rifle. One looks again at the matter which has been mentioned several times by Watkins J, s. 1(3), which contains the vital definition in these terms: "This section applies to every firearm except — (a) a shot gun (that is to say a smooth-bore gun with a barrel not less than 24 inches in length . . .)." In my imagination I pick up one of these weapons and look at it. I say: has it got a smooth bore? Yes, because the rifling has gone. Is the barrel more than 24 inches in length? Yes, it is. Therefore it is a shot gun for the purposes of this Act. How is that approach to be faulted? It is said by some that this cannot be a shot gun. This Lee-Enfield with the rifling bored out does not look like a shot gun; one cannot shoot rabbits with it. That may be so. It still seems to me to satisfy the definition of a shot gun in the Act.'





With that passage this court respectfully agrees. As I say, it is not for us to express our view what the particular weapon might look like. That is not the problem. The question is: Does it come within the exception as Parliament has set that exception?

Counsel for the Attorney-General draws out attention to subs. (1) of s. 57 which reads as follows:

'In this Act, the expression "firearm" means a lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged and includes — (a) any prohibited weapon, whether it is such a lethal weapon as aforesaid or not; and (b) any component part of such a lethal or prohibited weapon; and (c) any accessory to any such weapon designed or adapted to diminish the noise or flash caused by firing the weapon . . .'

He asks us to pay regard to the fact that the component parts of the Lee-Enfield or most of them are still there. It has only got an adapted barrel and chamber. The rest of the gun remains the same. All the component parts of the gun are the original component parts. Ergo, he says, it is covered by subs. (1)(c).

But that overlooks the words which follow in that subsection, which read as follows:

'and so much of s. 1 of this Act as excludes any description of firearm from the category of firearms to which that section applies shall be construed as also excluding component parts of, and accessories to, firearms of that description.'

So that once you have got to the situation, which this court thinks you have, that this is within the definition of shot gun, then all the component parts are likewise protected by the exception. That argument is circular and does not avail the Attorney-General.

Finally counsel, in his concluding argument, was trying to impress us with the dangerous situation which may result if the Attorney-General's reference does not succeed and if the appeal against conviction on the other count does succeed. He was suggesting to us that that might open the floodgate to undesirable possessors of weapons which could take .303 cartridges and might be detrimental to law-abiding citizens. Some of course think that a shot gun is just as lethal a weapon as a rifle. In certain circumstances it would be. In any event if the holder or possessor of one of these modified weapons desires to discharge from the weapon, albeit inefficiently, a round of .303 ammunition, he will, we understand, have to possess a firearm certificate before he can obtain such ammunition. In any event even if that is not the case, it is not for this court to fly in the face of what we consider to be the plain words of an Act of Parliament. If it is required to close up a possible loophole, that is for Parliament to do and not this court.

Finally there is one other matter to which it is desirable to draw attention, and that is the precise wording of the exception. This is a matter to which the court in *Creaser v Tunnicliffe* (1) did not avert.

(1) 142 JP 245; [1978] 1 All ER 569

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The last words, 'not being an air gun', seem to this court to have been unnecessary if the Crown's submission is correct, because an air gun would already have been excluded by virtue of the Act; that was a weapon not capable of firing ordinary shot gun ammunition. That particular point is not necessary, strictly speaking, for the decision of this court, but it is by way of comment.

For these reasons the appeal against conviction on count 2 succeeds and the conviction is quashed. The answer to the Attorney-General's reference, namely, whether it is possible so to adapt a Lee-Enfield rifle, which has admittedly been a firearm within the definition of s. 57(1) of the 1968 Act, as to exclude the firearm from the necessity for such a certificate by reason of s. 1(3)(a) of that Act, is Yes.

Orders accordingly

Solicitors: *Gray, Purdue & Co*, Waterlooville; Director of Public Prosecutions.

Reported by G.F.L. Bridgman, Esq., Barrister.

QUEEN'S BENCH DIVISION
(Lord Widgery, C.J., and May, J.)
March 4, 1980

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R v GREATER MANCHESTER JUSTICES. EX PARTE HORSLEY

Legal Aid – Refusal by justices – Appeal – Need to show that justices' decision unreasonable.

Justices refused applications for legal aid made by the applicant under s.73 of the Criminal Justice Act, 1967. The applicant moved the Divisional Court for an order of certiorari to bring up and quash the justices' decision and for an order of mandamus requiring the justices to grant legal aid.

Held: the court could do nothing in such a case unless the circumstances were shown to be such that no reasonable Bench, properly instructed, could have made the order appealed against; justices had a wide discretion in these matters; in the present case they had come to the conclusion that this was not a case in which either on merit or on means an application for legal aid could necessarily be granted; on the facts their decision was not unreasonable, and the applicant's application would be dismissed.

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Application by Geoffrey Michael Horsley for orders of certiorari and mandamus.

D. Altars for the applicant.
The respondents did not appear.

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LORD WIDGERY, C.J.: In these proceedings counsel moves on behalf of one Geoffrey Michael Horsley for an order of certiorari to bring up and quash a decision of the Greater Manchester justices sitting in Wigan on July 31, 1979, refusing the applications made under s.73 of the Criminal Justice Act, 1967, by the applicant for legal aid in respect of a complaint laid under s.96(2) of the Magistrates' Courts Act, 1952. There is also an application for an order of mandamus requiring the said justices to grant legal aid under s.73 to the applicant to enable him to resist the said complaint. The ground of the application is that the decision of the magistrates not to grant legal aid amounts to a denial of natural justice and thus supports the application for certiorari in itself.

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The case is quite simple as far as the facts are concerned. The applicant is an estate agent in Wigan, and he was initially charged with writing amorous letters to a lady employed in the tax office in the same town. This resulted in his being brought before the magistrates and being required to enter into a recognisance in the sum of £2,000 to keep the peace. And then away he went. Not very long after that there seems to have been a similar incident between the parties because we find the applicant before the court on the charges which I have mentioned. One sees from that that he has to answer a breach of the recognisance in respect of the initial offence and also that there is an application for mandamus in respect of the later incident.

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The formal documents requisite for an application for legal aid have all been completed, and the wealth of information which they produced was in the hands of the justices when they made their de-

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cision in July, 1979. The decision was to refuse legal aid in respect of each and every one of these applications. Before the justices reached that conclusion, they heard a solicitor address them on behalf of the applicant. They had access to the documents and to the figures that those documents showed, and the justices retired to consider the matter, having seen the applicant in court. Their decision was to refuse.

We can do nothing in this case unless the circumstances are such as to make us feel that this was an order which no reasonable Bench, properly instructed on the law, could have made. I stress that we are not asking ourselves whether we would have made the order if we had been the magistrates. The standard is the reasonable Bench, and the test is whether the order complained of, namely, the refusal of legal aid, is so unreasonable that no reasonable Bench, properly instructed, could have reached it. Authority for that proposition is *Brace-girdle v. Oxley*. (1)

What is the position here? As far as the documents are concerned, I do not find them very illuminating. They make it clear that the applicant is in a small way of business in Wigan. He goes into his debts and assets in quite considerable detail, and he discloses that at one stage during the argument about this legal aid question he had £1,000 in the bank and later on he had £750 in a building society. The justices came to the conclusion that this was not a case in which, either on merit or on means, an application for legal aid could necessarily be granted. One must remember that the justices have a wide discretion in these matters, and rightly so because they know their local area and they know how to approach local questions. We can only interfere, as I say, on the very limited ground to which I have referred, and for my part I do not think that the present cases comes within that ground. I would accordingly dismiss the application.

MAY, J.: I entirely agree.

Solicitors: *Seifert, Sedley & Co.*, for Casson & Co., Salford.

Reported by G.F.L. Bridgman, Esq., Barrister.

(1) 111 JP 131; [1947] 1 All ER 126; [1947] KB 349

COURT OF APPEAL

(Lord Widgery, C.J., Eveleigh, L.J., and O'Connor, J.)
March 28, 1980

R. v.
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Court of Appeal

R v MACHIN

Criminal Law – Perverting course of justice – Conduct which may lead, and is intended to lead, to miscarriage of justice – Need to prove tendency to pervert course of justice – Insufficiency of intention.

i

The appellant was charged with attempting to pervert the course of public justice. It was alleged that when he had given the police statements admitting that he had given two men permission to drive a motor vehicle belonging to him although he was aware that they did not hold licenses and were not covered by insurance he arranged with a friend to punch him in the eye and then stated that the police had caused the injury. In summing-up the judge directed the jury that attempting to pervert the course of justice was the doing of an act or acts that had the tendency and were intended to pervert the course of justice. On appeal,

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Held: the gist of the offence was conduct which might lead and was intended to lead to a miscarriage of justice: the word "attempt" did no more than describe a substantive offence which consisted of conduct which had the tendency and was intended to pervert the course of justice; to do an act with the intention of perverting the course of justice was not of itself enough, the act also must have that tendency; a jury, therefore, should not be directed to assess the accused's conduct in terms of proximity to an ultimate offence, but should be left to consider its tendency and the intention of the accused, which was done in this case, and the appeal would be dismissed.

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Appeal by Lawrence Machin against his conviction at Doncaster Crown Court of attempting to pervert the course of public justice.

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L. Scott for the appellant.

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R.M. Harrison for the Crown.

28th March, 1980 EVELEIGH L.J. read the following judgment of the court: On 5th October, 1979, in the Crown Court at Doncaster the appellant was convicted of attempting to pervert the course of public justice and was sentenced to nine months' imprisonment. He now appeals against conviction.

Eveleigh, L.J.

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On 10th August, 1978, police officers on two separate occasions stopped a motor vehicle belonging to the appellant. On each occasion it was driven by a different man and neither of them held a valid driving licence. On 19th August the appellant made written statements to the police claiming that neither man had permission to use the vehicle. On 10th September he went to the police station in connection with another matter. Two friends, Brian Allen and Keith Shaw, waited outside. In the station the appellant dictated two statements to the effect that he had given the two men permission to drive the vehicle and that he was aware that they did not hold licences and were not covered by insurance.

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Thereafter the case for the prosecution was as follows. When the appellant left the police station he asked Allen to punch him in the eye. This Allen did, causing the eye to swell. The appellant told Shaw and Mrs Shaw that the police officers had hit him. He said the same thing to his own wife and told her to telephone the Doncaster police and lodge a complaint. This she did. He made similar allegations to a hospital doctor and to his solicitor. He went to a photographer who photographed the eye. He asked Allen to give evidence that the police had caused his injury and Allen agreed. Later however Allen changed his mind. The appellant did not in fact collect the photograph. The appellant made a written statement admitting these facts, but in evidence he said that the statement had been composed by the police and that he had signed it because the police had threatened to have his children put into care if he did not sign. He denied the facts alleged by the prosecution.

At the close of the case for the prosecution counsel submitted to the judge that the facts alleged did not go far enough to amount to an attempt. Before this court he has argued that to charge the offence of attempting to pervert the course of public justice is to charge an inchoate offence and that the jury should be given directions as to how they may decide whether or not an act is sufficiently proximate to amount to an attempt.

The judge addressed the jury as follows:

'Now, what is attempting to pervert the course of public justice? It is this. It is the doing of an act or series of acts which have a tendency and are intended to pervert the course of justice. As to the course of justice, members of the jury, nobody disputes in this particular case that the course of justice in relation to the alleged offence of permitting this motor car to be used without insurance had begun.'

He went on to say:

"Attempting to pervert the course of justice is doing something which is designed to lead to a false conclusion if the matter goes the whole way, and doing an act or a series of acts which have a tendency to, and are intended to, pervert the course of public justice is this offence of attempting to pervert the course of public justice.'

Counsel had also submitted that, if his primary submission is wrong, the acts alleged in any event did not have a tendency to pervert the course of justice.

In directing the jury as he did the judge was following the words of Pollock, B., in *R v Vreones* (1). There the defendant had tampered with wheat samples taken for submission to arbitrators to be appointed to determine any dispute that might arise as to the quality of the

(1) 55 JP 536; [1891] 1 Q.B. 360

consignment. He was convicted of the common law misdemeanour of attempting by the manufacture of false evidence to mislead a judicial tribunal. Pollock, B., said:

'The real offence here is the doing of some act which has a tendency and is intended to pervert the administration of public justice.'

In *R v Andrews* (2) the accused sought to persuade the defendant in a motor accident prosecution to pay him to give false evidence at the trial. Referring to *R v Vreones* (1), Lord Widgery, C.J., said:

'So that the question arose whether it was possible to have an attempt to pervert the course of justice. Lord Coleridge, C.J., said: "The first count of the indictment in substance charges the defendant with the misdemeanour of attempting, by the manufacture of false evidence, to mislead a judicial tribunal which might come into existence. If the act itself of the defendant was completed, I cannot doubt that to manufacture false evidence for the purpose of misleading a judicial tribunal is a misdemeanour . . . I think that an attempt to pervert the course of justice is *in itself* a punishable misdemeanour; and though I should myself have thought so on the grounds of sense and reason, there is also plenty of authority to show that it is a misdemeanour *in point of law*." Accordingly, to produce false evidence with a view to misleading the court and perverting the course of justice is a substantive offence; an attempt so to act can be charged as such, and in our judgment an incitement so to act is also a charge known to the law and properly to be preferred in appropriate circumstances.'

In *R v Rowell* (3) Ormrod, L.J., said:

'The remaining grounds of appeal, namely duplicity in the indictment and the lack of sufficiently proximate acts to constitute an attempt, are both based, in our opinion, on the same false premise, which arises from the description of the offence as "Attempting to pervert the course of public justice". The use of the word "attempt" in this context is misleading. The appellant was not charged with an attempt to commit a substantive offence but with the substantive offence itself, which is more accurately, if less compendiously, described in Pollock, B.'s, words [in *R v Vreones* (1)] which we have already quoted, namely the doing of an act (or we would add a series of acts) which has a tendency and is intended to pervert the course of justice. Lord Coleridge, C.J., said [in *R v Vreones*] "I think that an attempt to pervert the course of justice is *in itself* a punishable misdemeanour."

The law is concerned to forbid unlawful conduct which may result in a miscarriage of justice. There are specific common law offences

(1) 55 J.P. 536; [1891] 1 Q.B. 360.

(2) 137 J.P. 325; [1973] 1 All ER 857.

(3) 143 J.P. 181; [1978] 1 All ER 665; [1978] 1 WLR 132

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such as embracery and personating a juryman. There are statutory offences, for example, the concealing for reward of information about an arrestable offence contrary to s. 5(1) of the Criminal Law Act, 1967. On the other hand, as is pointed out in the Law Commission's report on offences relating to interference with the course of justice (Law Com 96), the common law recognises a wide general offence variously referred to as perverting or obstructing the course of justice, obstructing or interfering with the administration of justice, and defeating the due course or the ends of justice. The particular acts or conduct in question may take many different forms including conduct that amounts in itself to some other criminal offence or attempt therat in the strict sense of an inchoate offence. The gist of the offence is conduct which may lead and is intended to lead to a miscarriage of justice whether or not a miscarriage actually occurs. We therefore respectfully agree that the use of the word 'attempt' in the present context is misleading, as was said in *R v Rowell* (3). The word is convenient for use in a case where it cannot be proved that the course of justice was actually perverted, but it does no more than describe a substantive offence which consists of conduct which has the tendency and is intended to pervert the course of justice. To do an act with the intention of perverting the course of justice is not of itself enough. The act must also have that tendency.

We are therefore of the opinion that the jury should not be directed to assess the accused's conduct in terms of proximity to an ultimate offence but should be left to consider its tendency and the intention of the accused as was done in this case. In our opinion, the acts alleged did have a tendency to pervert the course of justice even though the accused's plan was not pursued to a final successful conclusion, and the verdict of the jury was clearly supported by the evidence.

Appeal dismissed.

Solicitors: *M.J. Rose, Sheffield.*

Reported by G.F.L. Bridgman, Esq., Barrister.





CHANCERY DIVISION
(Goulding, J.)

April 16, 1980

Heywood
v.
Hull Prison
Board of
Visitors

HEYWOOD v. HULL PRISON BOARD OF VISITORS

Chancery
Division

Prison – Discipline – Adjudication by board of visitors – Proceedings by prisoner alleging adjudication null and void – Action for declaration – Judicial review – R.S.C., Order 53, r.1.

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The plaintiff brought an action against the defendants in the Chancery Division of the High Court claiming a declaration that an adjudication by the defendants sentencing him to various penalties for breaches of discipline while he was an inmate of Hull prison was null and void. The defendants gave notice of a motion contending that the action was an abuse of the court and seeking an order that all further proceedings be struck out and the action dismissed. They contended that the plaintiff should have applied for judicial review in accordance with R.S.C., Order 53, r.1.

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Held: the procedure under Order 53, r.1, was appropriate to the present case and a declaration might suitably be claimed by an application for judicial review but the court had a concurrent jurisdiction to grant a declaration in an action begun by writ or originating summons; Order 53, r.1, however contained a number of provisions for which there was good reason and which would be obviated if relief were sought by action instead of by application for judicial review. Moreover, proceedings under Order 53 had to be brought in the Queen's Bench Division the judges of which had a larger experience than those of the Chancery Division in such cases as the present; while one felt some sympathy for the opinion that, if the rules appeared to leave the plaintiff with a choice of procedure, he should be allowed to have it, the observance of judicial discipline in the hierarchy of the courts required the court to follow *Uppal v. Home Office* (1978), (C.A. Transcript 719), to decide that the defendants' motion succeeded, and order that all further proceedings in the action be stayed.

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Action by the plaintiff, Joseph Bernard Paul Michael Heywood, against the defendants, the Hull Prison Board of Visitors and the Home Office.

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*Lord Gifford for the plaintiff.
P. Gibson for the defendants.*

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GOULDING, J.: I have before me a motion on the part of the defendants in an action brought by Joseph Bernard Paul Michael Heywood as plaintiff against two defendants, namely, the Board of Visitors of Hull Prison and the Home Office. The plaintiff was a prisoner at Hull in the summer of 1976 at the time of the well-known disturbances that then took place there. In consequence of those disturbances, a large number of prisoners were charged with various breaches of discipline before the Board of Visitors of Hull Prison, the present first-named defendants. The plaintiff was charged with two specific offences alleged to have taken place on August 31, 1976, the charges being laid, as I understand, on October 12 in that year. On the next day, October 13, the board of visitors found the charge proved and sentenced the plain-

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tiff to various penalties, including a loss of remission of sentence amounting to 250 days. Some of the prisoners who were the subject of disciplinary proceedings after the Hull disturbances sought relief from the decisions of the board of visitors by way of application for certiorari. The Divisional Court of the Queen's Bench Division took the view that that remedy was not available in such a case. However, some of those concerned appealed to the Civil Division of the Court of Appeal, and there the decision of the Divisional Court was reversed and it was held that the determinations of the board of visitors could be called in question by way of certiorari. That case is reported as *R. v. Hull Prison Board of Visitors, ex parte St. Germain* (1). After the decision of the Court of Appeal, the plaintiff quickly came to know of it and took steps to seek legal aid and to endeavour to bring proceedings for his own benefit. There were, it is conceded, delays on the plaintiff's side and it is said (though I have no evidence on the point, but it is said by counsel on his behalf) that he personally was not to blame in the matter. I will so assume for the purposes of my judgment. However, in the event, the plaintiff did not seek relief by certiorari proceedings in the Queen's Bench Division, which would now have to be brought under RSC Order 53 by way of an application for judicial review. Instead, he issued a writ in the Chancery Division. That writ was issued on February 28, 1980. It is indorsed generally for one item of relief only, namely 'a declaration that the adjudication of the Board of Visitors on October 12, 1976, is null and void'.

On March 26, the plaintiff gave notice of a motion seeking an order for a speedy trial of the action. That is plainly a necessary move on his part, because he is now, so I am informed, only detained in prison in consequence of the loss of remission of 250 days by the sentence of the board of visitors. Accordingly, unless he can obtain relief reasonably quickly, it will be of no benefit to him in that regard. The notice of motion given on behalf of the plaintiff has been overtaken by a cross-notice of motion on the part of both defendants, the board of visitors and the Home Office. That seeks

'an order under the inherent jurisdiction of the court or under Order 18, r.19, of the Rules of the Supreme Court, that all further proceedings in the action be stayed or that the indorsement of the writ and the statement of claim herein be struck out and this action dismissed, on the ground that the action is an abuse of the process of the court and that before the commencement of any proceedings against the defendants in respect of the matters of complaint alleged in the said writ and said statement of claim the leave of the Divisional Court of the Queen's Bench Division should have been and should be sought under Order 53 of the said rules.'

Very properly and logically, it has been agreed that I should hear the defendants' motion first.

Several matters are, in my judgment, quite clear when one comes to consider the contentions put forward on behalf of the defendants. First

of all, all relief by way of judicial declaration, whether or not accompanied by relief of a more practical character, is equitable or statutory in origin. The common law of England itself knew of no such remedy. Secondly, there is ample and indisputable authority that all declaratory relief is in the discretion of the court, and there is authority of long standing that where the declaration sought is (as it were) independent (I mean where it is not introductory or ancillary to some other specific relief) the discretion is to be exercised with caution. Thirdly, under the Rules of the Supreme Court, which have the force of statute, in the form in which they stand at present and in the circumstances of the present case, there are at least two methods indicated of seeking a declaration from the court. One is in RSC Order 15, r.16, which says:

'No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether or not any consequential relief is or could be claimed.'

While that applies to all proceedings in the High Court, it looks primarily at actions, that is actions in the ordinary sense, begun by writ or originating summons, and it makes it clear that a writ or originating summons cannot be objected to merely because it asks for nothing but a declaration. So there is one way indicated of seeking such relief from the court. But in the present case there is an alternative and more special mode of approach indicated by RSC Order 53, which has been extensively revised quite recently, in 1977. I will read Order 53, r.1, which is divided into two paragraphs:

'(1) An application for (a) an order of mandamus, prohibition or certiorari, or (b) an injunction under s. 9 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, restraining a person from acting in any office in which he is not entitled to act, shall be made by way of an application for judicial review in accordance with the provisions of this order.

'(2) An application for a declaration or an injunction (not being an injunction mentioned in paragraph (1)(b)) may be made by way of an application for judicial review, and on such an application the court may grant the declaration or injunction claimed if it considers that, having regard to (a) the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari, ((b) the nature of the persons and bodies against whom relief may be granted by way of such order, and (c) all the circumstances of the case, it would be just and convenient for the declaration or injunction to be granted on an application for judicial review.'

The order goes on to provide for a preliminary *ex parte* application for leave to bring proceedings by way of judicial review and then for the substantive application to be made by originating notice of motion. Clearly, that procedure is appropriate to the present case. Reference to the facts and the judgment of the Court of Appeal in *St Germain's case*

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(1) shows plainly that relief sought against a decision of a board of prison visitors would fall within the scope of Order 53, r 1, and a declaration might suitably be claimed by an application for judicial review. Fourthly (and I am still dealing with matters that I consider clear), although the present case in its subject-matter is clearly and properly within the scope of Order 53, the court has jurisdiction to give a declaration in an action commenced by writ or originating summons. The existence of that concurrent jurisdiction seems to me to be sufficiently established by reported cases, of which it will be enough to refer to *Barnard v. National Dock Labour Board* (2) *Taylor v. National Assistance Board* (3) and *De Falco v. Crawley Borough Council* (4). The fifth and last of the points which in my judgment are clear is that, looking at the matter from the point of view of a court seeking to apply the existing Rules of the Supreme Court in the interests of justice, it is obviously undesirable that the plaintiff should seek relief by action rather than by application for judicial review.

There are a number of considerations which to my mind justify that opinion. First of all, the Rules of the Supreme Court as they stand must be construed as a whole. Where, in a code of procedural rules, carefully designed machinery is provided for determining a special class of issues or questions, it is in general inconvenient to use some broader form of process designed to cover not only that, but much larger categories of question. Secondly, Order 53, r.3(1), requires a would-be applicant for judicial review to obtain preliminary leave ex parte from a Divisional Court of the Queen's Bench Division or in vacation from a judge in chambers. There are very good reasons (among them an economy of public time and the avoidance of injustice to persons whom it is desired to make respondents) for that requirement of preliminary leave. If an action commenced by writ or originating summons is used instead of the machinery of Order 53, that requirement of leave is circumvented. Thirdly, by Order 53, r.4, certain requirements of expedition are laid down to be observed by an applicant for judicial review, though they are not inflexible and within limits the court has a discretion as to their application. Once again, there are very good reasons for such a requirement. Once again, the provisions of the rule are obviated if the relief is sought by action instead of by application for judicial review. In the present case the plaintiff or his advisers (for whom he is responsible) have, it may be, been guilty of some delay. It is no recommendation of the plaintiff's application that that has happened, though of course he may on investigation be able to excuse himself. Fourthly, Order 53, r.9(4), provides that where an order of certiorari is sought and obtained, the court may, in addition to quashing the decision to which the application relates, remit the

(1) [1979] 1 All ER 701; [1979] 2 WLR 42

(2)[1953] 1 All ER 1113; [1953] 2 QB 18

(3) [1958] AC 532

(4) [1980] 1 All ER 913; [1980] 2 WLR 664

matter to the court, tribunal or authority concerned, with a direction to reconsider it and reach a decision in accordance with the findings of the court. No such convenient machinery for remission of the cause is available in an action for a declaration. Fifthly, in proceedings seeking a review of a judicial or quasi-judicial determination, the machinery of an action as to discovery and giving of evidence may result in placing members of the tribunal concerned in a position not really compatible with the free and proper discharge of their public functions, or at least result in attempts to put them in that position. In the present case counsel for the plaintiff has contemplated the possibility (though he by no means says it will be a necessity) of cross-examining members of the board of visitors. In principle, that seems to me an undesirable way of dealing with such questions. Sixthly, proceedings under Order 53 have to be brought in the Queen's Bench Division, and that division has had and daily obtains a larger experience in these questions about administrative or quasi-judicial proceedings by bodies that are not courts in the full sense than the Chancery Division has. That last point is of little weight, because it could be met, if necessary, by an order for transfer to the Queen's Bench Division.

Those matters seem to me, as I have said, tolerably plain. But now I leave what is clear for the question that I have to decide. I think I have to ask myself in the end this question: Is the impropriety of using the procedure of an action in the present case so gross that the court, in exercising its undoubted power to regulate its own business and avoid abuse of its process, can stop an action that is within the court's jurisdiction to determine and that might conceivably succeed, stop it at the earliest stage, when the issues have not yet been defined by pleadings, nor elucidated by particulars or discovery, simply in order to force the plaintiff to use the proper machinery in the light of the rules considered as a whole?

Now, this question is not free from previous observations by judges and learned writers. On behalf of the plaintiff, I have been directed, among other things, to the report of the Law Commission on remedies in administrative law (Cmnd 6407 (1976)), which I am told led to the revision of RSC Order 53. The report says this:

In the light of our consultation, we are clearly of the opinion that the new procedure we envisage in respect of applications to the Divisional Court should not be exclusive in the sense that it would become the only way by which issues relating to the acts or omissions of public authorities could come before the courts.'

Consistently with that recommendation Order 53, as appears from the passages that I have read, while providing that in a suitable case an application for a declaration or an injunction may be made by way of judicial review, leaves it open, so far as any express words are concerned, to the applicant to proceed by action. There is, in other words, no rule of exclusion contained in Order 53.

Then I was referred also to what Professor de Smith says in his book, *Judicial Review of Administrative Action* (3rd edn, p.459). Discussing the remedy of a declaratory judgment in cases of administrative law, the learned author asks: 'Is jurisdiction to award a declar-

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ation excluded if another non-statutory remedy is available in the High Court and is equally or more appropriate?" He answers this question with a citation from an earlier writer: Borchard, *Declaratory Judgments* (2nd edn) p.318.

"There is a great force in the view that "it ought not to make any difference to judges through which door the petitioner enters the judicial forum, provided he is lawfully there and the court is in a position to grant him relief".

Somewhat similar language was employed by Lord Denning, M.R., in *De Falco v. Crawley Borough Council* (4), a case relating to the duties of a housing authority under the Housing (Homeless Persons) Act, 1977. He said:

"During the hearing, a point was raised about the procedure adopted by the plaintiffs. They issued writs in the High Court claiming declarations and an injunction. It was suggested that they should have applied for judicial review, because that was the more appropriate machinery. Now the interesting thing is that this new Act, the Housing (Homeless Persons) Act, 1977, contained nothing about remedies. It does not say what is to be done if the local authority fails to perform any of the duties imposed by the statute. It has been held by this court that, if the council fails to provide accommodation as required by s.3(3), the applicant can claim damages in the county court: see *Thornton v. Kirklees Metropolitan Borough Council* (5). I am very ready to follow that decision and indeed to carry it further, because this is a statute which is passed for the protection of private persons in their capacity as private persons. It is not passed for the benefit of the public at large. In such case it is well settled that, if a public authority fails to perform its statutory duty, the person or persons concerned can bring a civil action for damages or an injunction: see *Meade v. London Borough of Haringey* (6), Wade on Administrative Law (4th edn, p.633-634), and the Law Commission's Report on Remedies in Administrative Law (Cmnd 6407, para. 22). No doubt such a person could, at his option, bring proceedings for judicial review under the new RSC Order 53. In those proceedings he could get a declaration and an injunction equally well. He could get interim relief also. So the applicant has an option. He can either go by action in the High Court or county court, or by an application for judicial review."

That conclusion, that the plaintiffs in the *De Falco* case (4) had rightly proceeded by way of action for declarations and an injunction,

(4) [1980] 1 All ER 913; [1980] 2 WLR 664

(5) [1979] 2 All ER 349; [1979] 3 WLR 1

(6) [1979] 2 All ER 1016; [1979] 1 WLR 637

was shared by the other two members of the Court of Appeal who decided the case, Bridge, L.J., and Sir David Cairns. It is only, I think, of limited assistance to the plaintiff in the present case, because Lord Denning founded his observations on the hypothesis that the proceedings with which he was concerned were for the enforcement of a statute passed for the protection of private persons, and not passed for the benefit of the public at large. Also I think the Court of Appeal, in considering that the applicant had an option, were not concerned how far in the preliminary stages of the proceedings the court can interfere with initial freedom of choice. So far as they go, the observations in *De Falco*'s case reinforce the suggestion in Professor de Smith's book that it ought not to make any difference to judges through which door the petitioner enters the forum.

However, there has been much said that points in the other direction. As long ago as 1960, in *Pyx Granite Co Ltd v. Ministry of Housing and Local Government* (7) Lord Goddard said:

'It was also argued that, if there was a remedy obtainable in the High Court, it must be by way of certiorari. I know of no authority for saying that, if an order or decision can be attacked by certiorari, the court is debarred from granting a declaration in an appropriate case. The remedies are not mutually exclusive though, no doubt, there are some, notably convictions before justices, where the only appropriate remedy is certiorari.'

Thus Lord Goddard recognised the existence of a class of case in which a High Court declaration would not be an appropriate way of attacking a tribunal's decision, and there is at least a sufficient resemblance between the functions of justices of the peace and those of a board of prison visitors, operating in either case in the exercise of their judicial functions, for one to be on one's guard after reading what he said.

Now I come to what has been mainly relied on by the defendants in the present case, that is, a pronouncement by the Court of Appeal in an immigration case of *Uppal v. Home Office* (8). It has not been fully reported, but I have been furnished with a transcript of the proceedings. The case was one in which an application for a declaration in a matter of the immigration laws had been made to Sir Robert Megarry, Vice-Chancellor, in the Chancery Division. It failed. One of the grounds argued on behalf of the Home Office against the plaintiffs was that they ought to have proceeded in the Queen's Bench Division. That argument was rejected. Sir Robert Megarry, as will be seen in a moment, thought the proceedings in the Chancery Division were properly brought and should be decided on the merits. When the plaintiffs brought on their appeal in the Court of Appeal they decided, at what appears to have been an early stage, to abandon it and were content to submit to an order dismissing the appeal. The Court of Appeal were much con-

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(7) 123 JP 429; [1959] 3 All ER 1; [1960] AC 260

(8) (1978) CA Transcript 719

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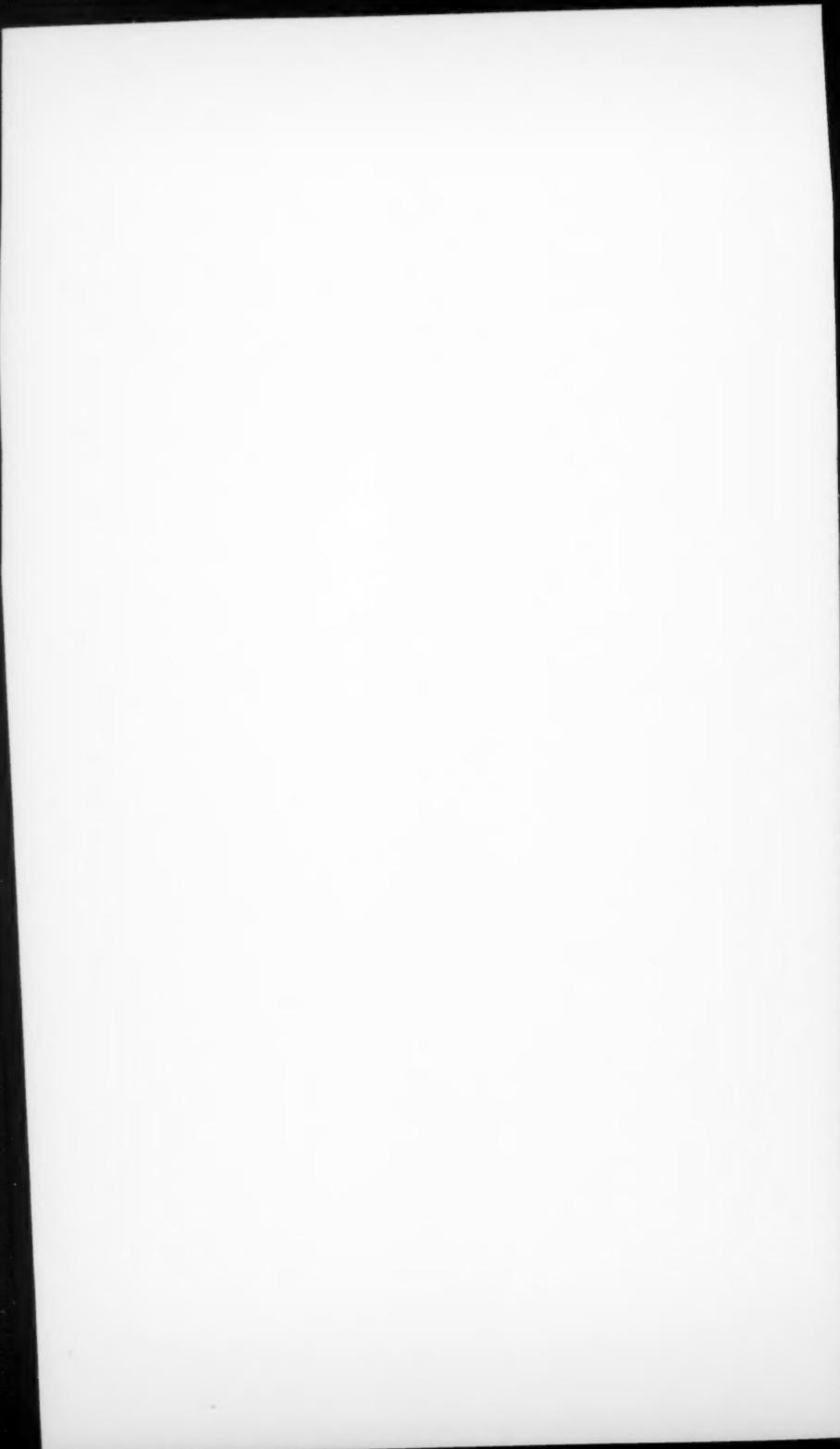
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cerned at certain observations of the judge below and, after some brief discussion with counsel, proceeded to express their views for the guidance, as it would appear, of the profession and the courts. The observations in question were made by Roskill, L.J., but can be taken to be those of the court, as Lane, L.J., and Sir David Cairns expressed their agreement without qualification. As the case is not fully reported I will read the greater part of what Roskill, L.J., said. After mentioning the abandonment of the appeal, he continued:

"There is, however, one difficulty this court feels it should refer to, and that relates to the procedure which was adopted in this case. The relief sought against the Secretary of State was in form indistinguishable from an application for judicial review under RSC Order 53, but the proceedings were not taken before the Divisional Court, nor was leave sought from the Divisional Court under Order 53. On the contrary, an originating summons was issued in the Chancery Division, the applicants being the plaintiffs to that summons and the Secretary of State the defendant . . . [Roskill, L.J., then cited part of the judgment of Sir Robert Megarry below:] "First [counsel for the Home Office] said that these were the wrong proceedings in the wrong division; the plaintiffs ought to have sought some prerogative order by way of judicial review in the Queen's Bench, and so no declaration should be granted. I do not accept this, nor do I accept counsel's watered-down version, seeking that I should make some obiter pronouncement that such cases ought to be brought in the Queen's Bench. Where two or more different types of proceedings are possible in the same court (and of course the Chancery Division and the Queen's Bench Division are both parts of the High Court) then I do not see why the plaintiffs should not be free to bring whatever type of proceeding they choose. I readily accept that the Queen's Bench Division has had a far greater experience of immigration cases than the Chancery Division has had, but that cannot require a plaintiff to proceed for judicial review in the Queen's Bench if he wishes to proceed for a declaration in the Chancery Division. I do not think the Chancery Division can be regarded as being avid for this jurisdiction: but it would be wrong to turn away or discourage a plaintiff who elects to bring one form of proceedings instead of the other." [Roskill, L.J., then continued:] With the greatest respect to Sir Robert Megarry I find myself unable to agree with the latter part of that passage. There is no doubt, and [counsel for the Home Office] before us had not sought to say otherwise, that in theory the Chancery Division has jurisdiction to entertain an application of this kind. But, as I said a moment ago, this application is in principle indistinguishable from an application for judicial review; and, where an application for judicial review is sought, then as Order 53, r.3(1), provides, that application must be made to the Divisional Court. I feel bound to say that I find it not a little surprising that this form of procedure has been chosen rather than an application to the Divisional Court for judicial review. It is the Divisional Court which is equipped by reason of its experience, expertise and long practice to deal with these matters





and to deal with them expeditiously; and I express the hope that in future it is the Divisional Court to which this type of problem will be submitted and that the temptation to deal with immigration problems by way of an originating summons in proceedings for a declaration in the Chancery Division will be avoided. . . . There is, as I said a moment ago, and [counsel] has not argued otherwise, jurisdiction in the Chancery Division to hear an application of this kind, but it would be wrong that this procedure should be adopted in order to bypass the need for getting leave from the Divisional Court to move for the relevant order where what in truth is sought is judicial review. As this is a matter of some general importance, I venture to make that criticism of what Sir Robert Megarry said with the greatest of respect to him.'

Now, it is not possible, in my judgment, to confine the force of the observations in *Uppal v. Home Office* (8), to immigration cases. The reasons given by Roskill, L.J., in the passage that I have read apply equally to the present case. The observance by applicants of the requirements of Order 53 with regard to preliminary leave and as to prompt timing are equally necessary or desirable in attempts to question the decisions of prison visitors as in attempts to question decisions of the immigration authorities. The superior experience and practice of the Queen's Bench Division are equally obvious in the present class of case. The judges of that division, who are accustomed to sit in the Criminal Division of the Court of Appeal and in the Crown Court and in the Queen's Bench Divisional Court itself, have in general quite plainly more acquaintance than the judges of the Chancery Division with this sort of subject-matter.

Secondly, it was suggested on behalf of the plaintiff that there is no persuasive authority in the pronouncement in *Uppal v. Home Office* (8) because it is inconsistent with the actual decision of the Court of Appeal in *De Falco v. Crawley Borough Council* (4). I think that is not so. As I have just shown in referring to the remarks of Lord Denning in *De Falco v. Crawley Borough Council*, the legislation there under consideration was of a special character directed to the protection of individual homeless persons. Whether or not the language used in the Court of Appeal fits comfortably together in the two cases, there is nothing in the decision in *De Falco's* case that is inconsistent with what was said in *Uppal's* case. The status of what was said in *Uppal's* case is, of course, unusual. The appeal was dismissed by consent, but the court felt constrained to express its view that part of the judgment below was erroneous. That being so, whether or not the views of the court are technically binding on me, they are clearly deserving of the greatest respect, because they were made for the guidance of both the profession and the lower courts. It seems to me that if the formulation of the matter in *Uppal's* case is correct, if indeed it is wrong that the procedure of an action should be adopted in order to bypass the need for getting leave from the Divisional Court, then in the present

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(4) [1980] 1 All ER 913; 2 WLR 664

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case it is my duty to put a stop at an early stage to the action. Although I have some sympathy for the opinion expressed by Professor de Smith in his book and by Sir Robert Megarry in *Uppal v. Home Office* (8) that, if the rules appear to leave the plaintiff with a choice of procedure, he should be allowed to have it, judicial discipline requires me to follow the view of the whole court in *Uppal's* case, whether technically binding or not. The observance of judicial discipline in the hierarchy of courts in this country seems to me much more important than any particular considerations affecting the plaintiff in this individual case. For those reasons, the defendants' motion succeeds and, subject to any observations of counsel, the proper order will be that I stay all further proceedings in the action.

Order accordingly.

Solicitors: *Treasury Solicitor; Sidney Torrance & Co for Barrington, Black, Austin & Co, Leeds.*

Reported by G.F.L. Bridgman, Esq., Barrister.

COURT OF APPEAL

(Lawton, L.J., Davies, J., and Balcombe, J.)
June 3, 1980

R v.
Mason

R. v. MASON

Court of
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Criminal Law – Trial – Right of prosecuting counsel to request member of jury panel to stand by – Need to show that member of panel biased – Need to inform defence regarding information received.

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The applicant was convicted in the Crown Court of burglary and handling stolen goods. Before his trial the police supplied prosecuting counsel with particulars of the convictions of persons who had been summoned to attend the court to form a jury panel to try the applicant, and on his appeal against conviction the applicant contended that counsel had wrongly used this information for the purpose of asking some members of the panel, who were not disqualified for jury service by their convictions from serving as jurors, to stand by for the Crown, and that he should have supplied to the defence the information he had obtained, but had not done so. On an application by the applicant for leave to appeal,

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Held: prosecuting counsel had a right to request that a member of the jury panel should stand by, and this right could be exercised without there being a provable valid objection until such time as the panel was exhausted: when it was, if the Crown still wanted to exclude from the jury any of those ordered to stand by, prosecuting counsel had to show cause, a valid objection must be shown; it followed that what prosecuting counsel did in the instant case, by requesting that a member of the panel should stand by because he had a conviction, did not constitute an irregularity in the trial; in the circumstances of the case there was no reason why prosecuting counsel should have supplied the defence with the information he had received, but cases might occur when it would be fair for prosecuting counsel to disclose such information to the defence, if, for example, it were known to him that a member of the panel was a relative of the principal police witness; the application was dismissed.

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Application by Vincent Mason for leave to appeal against his conviction at Northampton Crown Court of burglary and handling stolen goods.

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R B Martin QC and C Garside for the applicant.
D Barker QC and D W Brunning for the Crown.
S D Brown and J Laws as amici curiae.

Cur adv vult

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Lawton, L.J.

3rd June, 1980, LAWTON, L.J., read the following judgment of the court: On April 30 and May 1, 1979, the applicant was convicted in the Crown Court at Northampton before his Honour Judge Macgregor, after a trial lasting five weeks, on two counts of burglary (counts 3 and 6) and two counts of handling stolen goods (counts 2 and 5). The handling counts were alternative to counts of burglary (counts 1 and 4), and the property mentioned in them consisted of articles stolen in the course of the burglaries which had been committed. He was sentenced to concurrent terms of five years' imprisonment on each of the burglary counts and to two years' imprisonment on each

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of the handling counts. He now applies for leave to appeal against his convictions.

The four burglaries charged in the indictment were of country houses situated within twenty miles of one another in Derbyshire, and all within a night's operating distance for a burglar from Salford, where the applicant lived. They were committed within a period of seven and a half months. On each occasion valuable antiques were stolen. On three of the four occasions the burglar or burglars hid the stolen articles near the house, the inference being that whoever was taking part would be travelling from the houses to base by road at night and did not wish to be found by the police in possession of stolen articles. On two occasions the burglar or burglars carried with them gas cylinders which, when attached to cutting appliances, could be used for gaining entry. Similar cylinders of identical make, one with a blowlamp attachment, were found in the applicant's house when it was searched. Antiques from three of the houses either were or had been in the applicant's possession. A pair of Georgian silver wine coasters, stolen from Ashford Hall during the night of 10th-11th September, 1976, were entered by him for an auction which took place in London on 29th April, 1977. An eighteenth-century French mantel clock, stolen from Windley Hall in the early hours of 11th March, 1977, was found in his possession on 5th May, 1977, as were a gold key and a lump of gold which came from Kedleston Hall, which was burgled during the night of 22nd-23rd April, 1977. Scientific examination revealed that the gold had come from gold leaf stripped from an ornamental pagoda which had been stolen from Kedleston Hall during the burglary and which had been recovered by the police on 27th April, 1977.

When interviewed by the police the applicant made a number of oral statements which were consistent with his knowing that the burglaries had taken place and his being in close touch with the burglars. At his trial he put forward alibi defences in respect of two of the burglaries, those at Tissington Hall and Kedleston Hall. The jury rejected both alibi defences. The one relating to Kedleston Hall had clearly been fabricated and involved the production of a forged hotel register. The evidence of the applicant's participation in the Tissington Hall burglary was very strong. Part of the property stolen from that house had been hidden nearby in cushion covers and half a curtain. Cushion covers having a similar stitching and the other half of the curtain were found in the applicant's house.

The applicant handed in a notice of appeal at the prison on 31st May, 1979. He was three days out of time, but we have granted an extension. He stated that his grounds of appeal were being prepared by counsel. On 4th July, 1979, grounds of appeal settled by counsel were received by the registrar. They were lengthy and related mainly to alleged misdirection about the evidence. After they had been submitted a journalist, so counsel for the applicant informed us, told someone representing the applicant that at his trial the jury had been empanelled in breach of the guidelines issued by the Attorney-General, Mr S C Silkin QC, and communicated to chief constables, including the Chief Constable of Northamptonshire, by Home Office circular 165/1975, dated 10th October, 1975. Inquiries on behalf of the applicant showed that this was so. As a result further grounds of appeal

were submitted on 13th February, 1980. They can be summarised in the terms in which counsel for the applicant made his submissions to the court, namely, that before the applicant's trial the police in Northamptonshire had checked the names of those summoned to attend the Crown Court to form a jury panel against the criminal records kept locally. They had supplied prosecuting counsel in this case (Mr David Barker QC) with particulars of the convictions of those on the panel, which he had wrongly used for the purpose of asking some members of the panel, not disqualified by their convictions from serving, but whose names were called to serve on the jury to try the applicant, to stand by for the Crown.

As there was no report of what had happened when the jury were empanelled, I asked counsel and those instructing them to attend a pre-appeal review. Counsel were able to agree that Mr Barker had asked four members of the jury panel to stand by for the Crown. His recollection was that he had asked one to do so because the officer in charge of the prosecution's case had told him that this member was known to him. The probabilities were that he had asked the others to stand by because, on the information supplied to him through the instructing solicitor, they had previous convictions. He could not remember whether they were convictions which would have disqualified them from service on a jury. As a result of further inquiries which were made following the directions which I gave, it was discovered that at least one of the three asked to stand by because of convictions was not disqualified thereby from jury service.

It is pertinent to record what was discovered when the jury panel was scrutinised by the police against the criminal records. Of the 100 persons believed by the jury officer of the Crown Court to be qualified for jury service and summoned to attend the Crown Court at the relevant time, the police on searching the local criminal records found that ten appeared to have previous convictions. Of these, two had convictions for road traffic offences, but in one of these cases there was a conviction for driving with excess alcohol. In six cases, however, the convictions were not positively linked with members of the panel; there was nothing more than a similarity of names. Of those who were positively linked two were disqualified from service; and of these two one had served a sentence of five years' imprisonment for buggery; the other had numerous findings of guilt as a juvenile for a variety of offences, including burglary and indecent assault, and four years before the start of the trial, when he was about 17, he had been sent to a detention centre for six months for eight offences of criminal damage. The probabilities are that the member of the jury who was not disqualified, but who was asked to stand by for the Crown, had been found guilty as a juvenile in 1974 for two cases of burglary and two cases of theft. He had been made the subject of a supervision order.

We found these facts disturbing. The inference which we draw is that persons who are disqualified from jury service are not disclosing that they are so disqualified and that they are sitting on juries. We were told by counsel who appeared as *amicus curiae* that since 1974, when the present qualifications for jury service were fixed by the Juries Act 1974, there have been only two prosecutions for serving on a jury whilst disqualified, which is an offence under s. 20(5) of the 1974 Act.

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In one of these two cases there was an acquittal; in the other the penalty imposed was a fine of £10. If two disqualified jurors can turn up in Northamptonshire out of a hundred summoned, the number is likely to be much greater when a panel is summoned from an urban area with a high level of crime. The case reveals how over-optimistic Lord Denning MR was when he said, obiter, in *R v Crown Court at Sheffield, ex parte Brownlow* (1):

i 'as a matter of practical politics, even if jury vetting were allowed, the chances are a thousand to one against any juror being found unsuitable; and, if he should be, the chances of his being on any particular jury of twelve, so as to influence the result, are minimal, especially in these days of majority verdicts.'

ii In this case had not counsel for the Crown asked three jurors to stand by for the Crown there might have been two disqualified jurors and one with findings of guilt for burglary and theft on the jury which tried the applicant. As a result of what he did the members of the jury which was empanelled had no convictions. That at least is certain.

iii Counsel for the applicant in the course of his submissions accepted that he had to satisfy this court that there had been a material irregularity in the course of the trial. This was because we exercise a statutory jurisdiction under which we can allow an appeal against conviction only if we think that one or more of three grounds for doing so have been established: see s. 2(1) of the Criminal Appeal Act, 1968. The only relevant ground in this case was that relied on by counsel for the applicant. He agreed that he could not rely on what happened before the trial started as a material irregularity. Prosecuting counsel had knowledge about the previous convictions of members of the jury panel which had come from a police search of the local criminal records, but it might have come from some other source. Both counsel for the applicant and counsel for the Crown accepted that the police had not acted unlawfully in disclosing to prosecuting counsel the information about the jury panel which they did. It is not too fanciful, we think, to envisage the case of an experienced prosecuting counsel recognising a member of the jury panel as being someone whom he had prosecuted to conviction.

v iv The problem in this case is the use to which prosecuting counsel can put such information when a jury is empanelled. Counsel for the applicant submitted that he can only use it when exercising the unquestionable common law right of prosecuting counsel to ask a member of the panel to stand by for the Crown, if on the information which he has there are reasonable grounds for thinking that he could show cause if he were called on to do so. To show cause he would have to be able to satisfy the court that the member of the panel was biased towards either the Crown or the accused: see 26 Halsbury's Laws (4th edn) para 627, and the cases referred to in note 4. The bare fact that a member of the panel has a conviction recorded against him does

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(1) ante p. 1; [1980] 2 All E R 444.

not by itself prove bias. Further, submitted counsel for the applicant, on its true construction the 1974 Act envisages that all who are qualified to serve as jurors in the Crown Court shall be allowed to do so unless they are ineligible or disqualified or excused under sched. 1 to that Act.

The argument based on the construction of the 1974 Act is misconceived. The Act, as is shown by its long title, was one to consolidate certain enactments relating to juries, jurors and jury service, with corrections and improvements coming within the provisions of the Consolidation of Enactments (Procedure) Act, 1949. Save in relation to the statutory qualifications for jury service, it did not make any fundamental changes in the law relating to juries and jurors. Save as altered by the Act:

'all enactments and rules of law relating to trials by jury, juries and jurors shall continue in force and, in criminal cases, continue to apply to proceedings in the Crown Court as they applied to proceedings before a court of oyer and terminer or gaol delivery.'

See s. 21(5). Before 1974 prosecuting counsel, without showing cause, could ask a member of the jury panel to stand by for the Crown, and the trial judge could refuse to allow a member of the panel to be sworn, even though there had been no challenge by either party. Counsel for the applicant accepted that this was the law before 1974.

In our judgment, the 1974 Act, far from altering the old law, has by s. 21(5) confirmed it. For centuries the law has provided by enactment who are qualified to serve as jurors, and has left the judges and the parties to criminal cases to decide which members of a jury panel were suitable to serve on a jury to try a particular case. To this extent the random selection of jurors has always been subject to qualification. Defendants have long had rights to peremptory challenges and to challenges for cause; prosecuting counsel for centuries have had the right to ask that a member of the panel should stand by for the Crown and to show cause why someone should not serve on a jury; and trial judges, as an aspect of their duty to see that there is a fair trial, have had a right to intervene to ensure that a competent jury is empanelled. The most common form of judicial intervention is when a judge notices that a member of the panel is infirm or has difficulty in reading or hearing; and nowadays jurors for whom taking part in a long trial would be unusually burdensome are often excluded from the jury by the judge.

In our judgment, the practice of the past is founded on common sense. A juror may be qualified to sit on juries generally but may not be suitable to try a particular case. An example put to the counsel for the applicant during argument shows this. X is charged with unlawfully wounding a gamekeeper while out poaching. The prosecution's case is that he was a member of a gang at the material time. When the jury comes to be empanelled one member of the panel is found to have a number of convictions for poaching (not amounting to disqualifications) all in the petty sessional division where the gamekeeper worked. In our judgment, to allow such a man to serve on that jury would be an affront to justice. He would be unlikely to be impartial,

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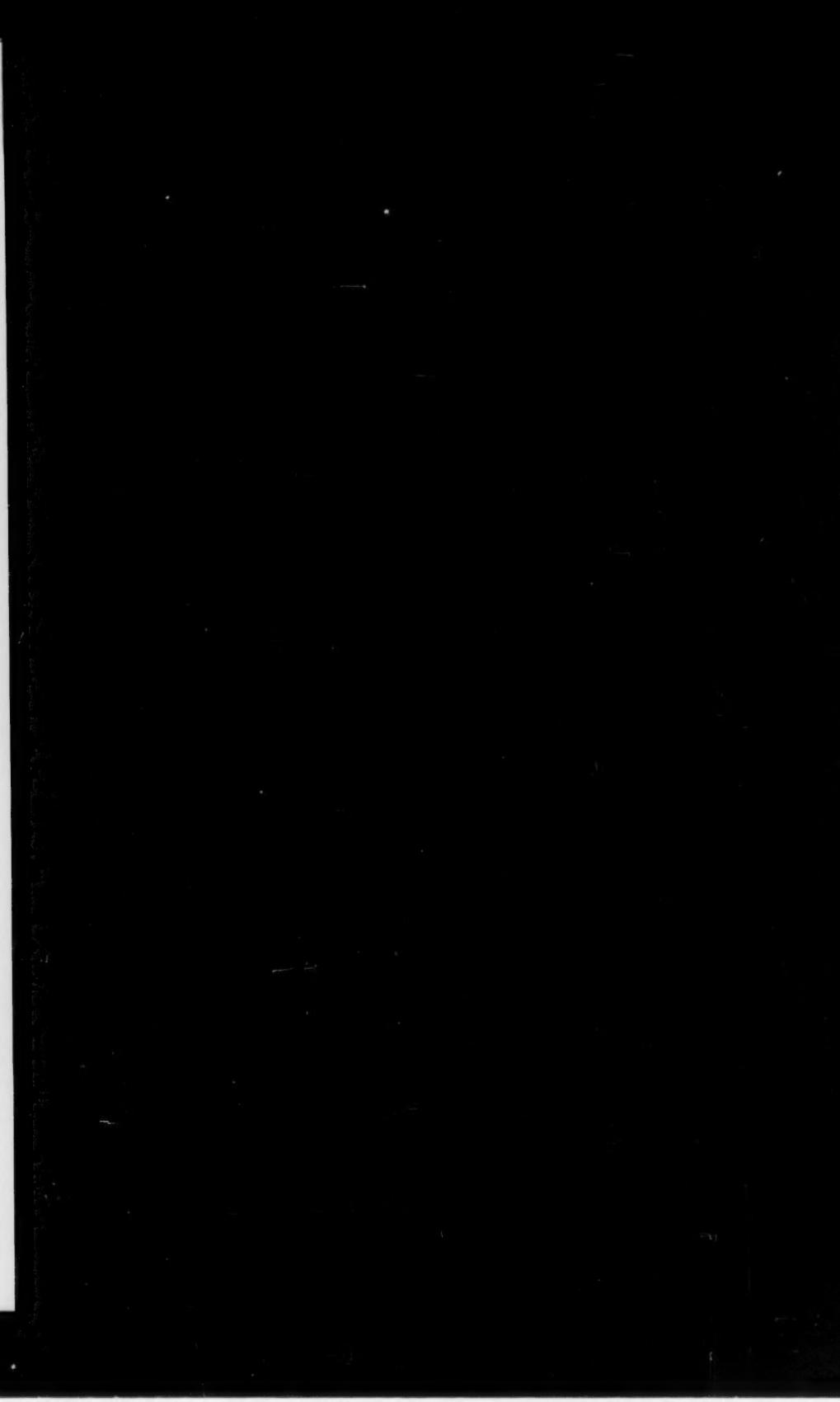
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- and, although he would be only one of twelve, he could be expected to press his point of view, and its effect on his fellow-jurors would depend on his persuasive powers and their receptiveness to suggestion. The prospect of the case being tried according to the evidence would, in our judgment, be materially reduced. Counsel accepted that this would be so, but he used this example to support his submission that prosecuting counsel should ask members of the panel to stand by for the Crown only if there are reasonable grounds for thinking that there might be bias. In the example put to him there would be such grounds.
- Counsel supported his submission in this respect by inviting our attention to the history of challenges to a jury panel made on behalf of the Crown. This history is long. We shall give it only in bare outline in this judgment as it was reviewed in the case which we consider binds us, namely *Mansell v. R.* (2). More recent statements of the historical details are to be found in the argument of the Solicitor-General in *R v. Chandler* (3), and in Mr J.F. McEldowney's article 'Stand by for the Crown: an Historical Analysis' [1979] Crim LR 272.
- Before 1305 the Crown at common law had the right to challenge peremptorily an unlimited number of jurors. This led to abuse in that by exhausting the panel with peremptory challenges the Crown was able to ensure that the defendant was kept without trial and in custody until the next sessions. This abuse was put an end to by the Ordinance for Inquests, 1305, the material parts of which are as follows:
- 'but if they that sue for the King will challenge any of those jurors, they shall assign of their challenge a cause certain, and the truth of the same challenge shall be enquired of according to the custom of the court'
- That statute was repealed by s. 62 of the Juries Act, 1825, and replaced by s. 29 of that Act. This section, which is still in force with minor amendments (see s. 12(5) of the 1974 Act), provides as follows:
- 'That in all inquests to be taken before any of the courts hereinbefore mentioned, wherein the King is a party, howsoever it be, notwithstanding it be alleged by them that sue for the King, that the jurors of those inquests, or some of them, be not indifferent for the King, yet such inquests shall not remain untaken for that cause; but if they that sue for the King will challenge any of those jurors, they shall assign of their challenge a cause certain, and the truth of the same challenge shall be enquired of according to the custom of the court; and it shall be proceeded to the taking of the same inquisitions, as it shall be found, if the challenges be true or not, after the discretion of the court; and that no person arraigned for murder or felony shall be admitted to any peremptory challenge above the number of twenty.'
- This section had to be construed in *Mansell v R* (2). The defendant was indicted for murder. When the panel of jurors was called several

(2) (1857), 22 J P 19; 8 State Tr. (N.S.) 831.

(3) 128 JP 244; [1964] 1 All ER 761; [1964] QB 322



INCORRECT VOLUME NUMBER, SHOULD READ VOLUME 145.

were challenged peremptorily for the prisoner, and several at the request of counsel for the Crown were ordered to 'stand by'. By this time only nine jurors had been sworn, and no more members of the panel were in court, although other members were out of court considering their verdict in another case. When the names of those ordered to stand by were called again counsel for the Crown once more asked that they should stand by. Counsel for the prisoner submitted that the Crown should now show cause. Prosecuting counsel replied that there was no need for him to show cause as the full panel had not been exhausted, and that he was obliged to show cause only when it had been. The trial judge ruled in favour of the Crown. The record was removed by writ of error into the Queen's Bench before Lord Campbell CJ, Wightman, Erle and Crompton JJ. The judgment of the court was delivered by Lord Campbell. He started by saying:

'Our judgment chiefly depends upon the right construction of the ancient statute, 4 stat. 33 Ed. 1, entitled "An ordinance for inquests" which was reenacted by the Juries Act 1825. But there was no intention of taking away all power of peremptory challenge from the Crown, while that power, to the number of thirty-five, was left to the prisoner. Indeed, unless this power were given under certain restrictions to both sides, it is quite obvious that justice could not be satisfactorily administered; for it must often happen that a juror is returned on the panel who does not stand indifferent, and who is not fit to serve upon the trial, although no legal evidence could be adduced to prove his unfitness. The object of the statute is fully attained if the Crown be prevented from exercising its power of peremptory challenge, so as to make the trial go off while there are twelve of those returned upon the panel who cannot be proved to be liable to a valid objection. Accordingly, the course has invariably been, from the passing of the statute to the present time, to permit the Crown to challenge without cause till the panel has been called over and exhausted, and then to call over the names of the jurors peremptorily challenged by the Crown, and to put the Crown to assign cause, so that, if twelve of those upon the panel remain as to whom no just cause of objection can be assigned, the trial may proceed. In our books of authority, the rule is laid down that the King need not shew any cause of his challenge till the whole panel be gone through, and it appears that there will not be a full jury without the person so challenged.'

It is clear from this passage that Lord Campbell regarded prosecuting counsel's request that a member of the panel should stand by for the Crown as being the equivalent of a peremptory challenge which could be exercised until the whole panel had been called. It was then, and only then, that prosecuting counsel had to show cause if he still wanted to exclude from the jury any of those ordered to stand by. He referred to requests to stand by as 'the peremptory challenges of the Crown'.

Later in his judgment Lord Campbell dealt with a point which had arisen because the trial judge had suggested that a member of the panel should withdraw because, before being sworn, he had said that he had conscientious scruples against capital punishment:

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'But we wish it to be understood that we by no means acquiesce in the doctrine boldly contended for at the bar, on the authority of Brownlow in an *Anonymous* case (4) that a judge, on the trial of a criminal case, has no authority, if there be no challenge either by the Crown or by the prisoner, to excuse a jurymen on the panel when he is called, or to order him to withdraw, although he is palpably unfit by physical or mental infirmity to do his duty in the jury box. We are not now to define the limits of this authority; but we cannot doubt that there may be cases, as if a jurymen were completely deaf, or blind, or afflicted with bodily disease which rendered it impossible to continue in the jury box without danger to his life, or were insane, or drunk, or with his mind so occupied by the impending death of a near relation that he could not duly attend to the evidence, in which, although from there being no counsel employed on either side, or for some reason, there is no objection made to the jurymen being sworn, it would be the duty of the judge to prevent the scandal and the perversion of justice which would arise from compelling or permitting such a jurymen to be sworn, and to join in a verdict on the life or death of a fellow creature.'

This judgment was taken into the Exchequer Chamber by means of a second writ of error. The appeal was heard by Cockburn CJ, Williams J, and Willes J, and Bramwell B, Watson B and Channell B. The judgment of Lord Campbell CJ was affirmed. In the course of his judgment Channell B said:

'We are to construe this old Act by the aid of the decisions, reading it with the assistance of what has been done since in course of law. It is clear, then, that till the panel is exhausted, and it is seen that a full jury cannot be obtained, the Crown has a right to ask to have a juror to stand by: and, whether this is properly called a challenge or not, the course said on the record to have been adopted at the trial was right.'

In our judgment, *Mansell v R* (2) established beyond argument that prosecuting counsel have a right to request that a member of the jury panel shall stand by, and that this right can be exercised without there being a provable valid objection, until such time as the panel is exhausted; and when it is, if the Crown still wants to exclude a member of the jury from the panel, a valid objection must be shown. It follows that what prosecuting counsel did in this case, by requesting that a member of the panel should stand by because he had a conviction, was not a material, or indeed any, irregularity in the course of the trial.

Complaint was made in the grounds of appeal that counsel for the Crown had not supplied the defence with the information which he had about members of the panel. In the circumstances of this case there was no reason why he should have done so. In general, the fewer

(2) (1857), 22 J P 19; 8 State Tr. (N.S.) 831.

(4) (1607), 1 Brownl. 41.

people who know about any conviction which a member of a jury panel may have the better. This is probably why, when prosecuting counsel do exercise the Crown's right of stand by, they are never asked why they are doing so. We would expect them to act responsibly and not to request a stand by unnecessarily. In general, for example, a conviction for reckless driving ought not to provide a reason for a request to stand by when the indictment charges burglary; but it might if causing death by reckless driving were charged. Cases may occur when it would be fair for prosecuting counsel to disclose his information to the defence, as, for example, if it were known to him that a member of the panel was a relative of the principal police witness. What should be done must be left to the discretion of prosecuting counsel.

Before leaving this part of the case we wish to stress that his judgment is concerned solely with what happened in the course of the applicant's trial. The facts which have been revealed show that some scrutiny of jury panels is necessary if disqualified persons are to be excluded from juries. The police are the only authority able to do this. Since it is a criminal offence for a person to serve on a jury knowing that he is disqualified, for the police to scrutinise the list of potential jurors to see if any are disqualified is to do no more than to perform their usual function of preventing the commission of offences. In the course of looking at criminal records convictions are likely to be revealed which do not amount to disqualifications. We can see no reason why information about such convictions should not be passed on to prosecuting counsel. He may consider that a juror with a conviction for burglary would be unsuitable to sit on a jury trying a burglar; and if he does so he can exercise the Crown's rights. Many persons, but not burglars, would probably think that he should.

The practice of supplying prosecuting counsel with information about potential jurors' convictions has been followed during the whole of our professional lives, and almost certainly for generations before us. It is not unlawful, and has not until recently been thought to be unsatisfactory. We have not been concerned in any way with, and make no comment on, the giving to prosecution counsel of information other than that relating to convictions, or with the desirability of making other inquiries about members of a jury panel. In so far as the obiter dicta of this court in *R v Crown Court at Sheffield, ex parte Brownlow* (1) differ from what we have decided in this case we justify our presumption by the knowledge that we have been able to examine the issues raised in greater depth than our brethren were able to do. Further, it is no part of our function to criticise either the contents of Home Office circular 165/1975 or the Attorney-General's statement entitled 'Checks on Potential Jurors', which he issued in October, 1978. Both the circular and the statement contain advice; they were not directions having the force of law, as counsel as *amicus curiae* accepted. Whether the advice should be changed in the light of this judgment is for the Home Secretary and the Attorney General to consider.

The submissions of counsel for the applicant about the trial judge's rulings and directions can be summarised as follows: first, that he

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(1) ante p. 1; [1980] 2 All E R 444.

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should have withdrawn the two handling counts from the jury, and, second, that he misdirected the jury by inviting them to consider the evidence on one burglary count when considering that on another.

The complaint in relation to the handling counts had two facets. First, counsel submitted that, as the prosecution were alleging that the applicant had been the burglar at all four country houses, they should not have been allowed to continue with the alternative handling charges. He invited our attention to *R v Christ* (5). In our judgment, there is nothing in this complaint. Although the prosecution invited the jury to return verdicts of guilty to burglary, there was evidence, other than that relating to burglary, on which the jury could return verdicts of guilty of handling. This case was very different from *R v Christ*. In that case when the jury rejected, as they did, the evidence relating to larceny there was no evidence left relating to receiving.

Counsel's second submission about the handling counts had more substance. At the end of the prosecution's evidence relating to the applicant's possession of the two Georgian coasters stolen from Ashford Hall during the night of 10th-11th September 1976 the only evidence of possession of recently stolen property was his assertion to the police that he had bought them in February, 1977, that is, five months later, from a dealer about whom he gave no particulars. The judge must have thought that this was capable of being evidence of recent possession. In his direction to the jury he explained correctly what was meant by recent possession and left them to decide, having regard to the nature and quality of the articles, whether there was evidence of recent possession. They must have decided that there was, and drew inferences of guilt. In our judgment, they were entitled to do so. The evidence relating to the eighteenth-century clock stolen from Windley Hall during the early hours of 11th March 1977, and found in the applicant's house at the beginning of May 1977, was clearly evidence of recent possession. The jury were correctly directed as to it.

In his direction to the jury about how they were to approach the evidence the trial judge told them that they were to consider the evidence on each count separately, but that when doing so they could consider the evidence on other counts for the purpose of identifying the applicant as the burglar on a particular count. This was because of the similarities between the burglaries. Counsel accepted that this direction was correct, provided that there were similarities. He submitted that there were not. In our judgment, there were. On the evidence the jury could reasonably have inferred that all four burglaries were committed by the same man operating from a base not too far away. The burglar had left his 'hallmark' on three of them, including that at Tissington Hall, by the kind of articles that he had stolen and the way in which he had hidden the stolen property near the scenes of his crimes. The evidence relating to Tissington Hall identified him as the man who had burgled that house. His 'hallmark' left at Windley Hall and Kedleston Hall, together with his possession of property stolen from those houses, was capable of identifying him with those burglaries, and his possession of gas cyclinders when carrying out the

Tissington Hall burglary, coupled with the finding of similar gas cylinders in his house, was capable of linking him with the Ashford Hall burglary. He was fortunate that the jury acquitted him of the Ashford Hall and Windley Hall burglaries. In our judgment, there was nothing wrong with the judge's direction to the jury about the evidence. The application for leave to appeal is refused.

Application dismissed

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Solicitors: *John Bentham & Co*, Manchester; *R C Beadon*, Northampton; Director of Public Prosecutions.

Reported by G.F.L. Bridgman Esq., Barrister.

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QUEEN'S BENCH DIVISION
(Waller, L.J., and Park, J.)

June 9, 1980

MAIDSTONE BOROUGH COUNCIL v MORTIMER

Local Authority – Order – Infringement – Need to prove knowledge by defendant of existence of order – Tree preservation order – Town and Country Planning Act, 1971, s. 102(1).

The respondent was charged before justices with an offence under s. 102(1) of the Town and Country Planning Act, 1971, of destroying an oak tree in contravention of a tree preservation order made by the appellant local authority, but he was acquitted on the ground that knowledge of the existence of the order was an essential ingredient of the offence and it was not proved that the respondent had that knowledge. On an appeal by the council,

Held: if it were the law that no conviction could be obtained under s. 102(1) of the Act of 1971 unless the prosecutor could discharge the often impossible burden of proving that the accused knew of the existence of the relevant order the section would have little, if any, deterrent effect; the section should not be interpreted as making the destruction of a tree an offence only if the accused had knowledge of the order; and the appeal should be allowed.

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Case Stated by Kent justices.

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H.B. Sales for the appellant council.
D. Davies for the respondent.

Cur adv vult

9th June, 1980. The following judgments were read.

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PARK J.: This is an appeal by Case Stated by the Maidstone Borough Council against the dismissal by the Maidstone justices on 22nd August,

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1978, of an information against the respondent charging him that he did on Friday, 13th January, 1978, at 11 Rushford Close, Headcorn, contravene the provisions of the County of Kent (Hollingbourne Rural District) Tree Preservation (No 2) Order, 1964, and that without the consent of the Maidstone Borough Council he did wilfully destroy an oak tree specified at T2 in sched. 1 to the order and on the plan annexed thereto, contrary to s. 102(1) of the Town and Country Planning Act, 1971, which provides:

'If any person, in contravention of a tree preservation order, cuts down or wilfully destroys a tree, or tops or lops a tree in such a manner as to be likely to destroy it, he shall be guilty of an offence and liable on summary conviction to a fine not exceeding £250 or twice the sum which appears to the court to be the value of the tree, whichever is the greater.'

On this appeal, the question for determination is whether on a charge under s. 102(1) knowledge of the wrongfulness of the accused's act has to be proved by establishing that he knew of the existence of the tree preservation order in respect of the tree the subject-matter of the charge.

The respondent is by occupation a tree feller. He was employed by a Mrs. Twydell to cut down a fully mature oak tree which was subject to the tree preservation order referred to in the information. Mrs. Twydell told the respondent, as she honestly believed to be the case, that she had received permission from the parks department of the local authority to cause the tree to be felled. No such consent had in fact been given. After the respondent had made one cut in the tree he was told by a Mr. Woodcock, the vice-chairman of the parish council, that he believed that the tree was the subject of a tree preservation order. Mr. Woodcock requested the respondent to stop the tree felling operation until the arrival of a Mr. Musker who would be able to confirm, or otherwise, the existence of such an order. The respondent, in reliance on the accuracy of Mrs. Twydell's information, made a further cut in the tree. The combined effect of the two cuts made the tree dangerous so that a council official, who eventually arrived at the scene, ordered the felling of the tree to be completed.

The justices held that, by his deliberate act in making cuts in the tree, the respondent had wilfully destroyed the tree. In arriving at that conclusion the justices followed the decision of this court in *Barnet London Borough Council v. Eastern Electricity Board* (1) where it was held that if a person inflicted on a tree so radical an injury that in all the circumstances a competent forester, taking into account its situation, eg its proximity to a highway, would decide that it ought to be felled, that person would have 'wilfully destroyed' the tree within s. 29(1)(a) of the Town and Country Planning Act 1962. No serious challenge is made or could be made on the respondent's behalf to this finding. The justices nevertheless acquitted the respondent because, in their opinion, knowledge of the existence of the tree preservation order was an essential ingredient of an offence under s. 102(1) and the re-

(1) 137 J.P. 486; [1973] 2 All E.R. 319; [1973] 1 W.L.R. 430

spondent did not have that knowledge.

I think it is necessary to consider first those sections of the Town and Country Planning Act, 1971, which deal with tree preservation in order to determine the mischief with which this part of the statute is intended to deal.

Section 59 imposes on the local planning authority the duty of ensuring, whenever it is appropriate, that, when granting planning permission for any development, adequate provision is made, by the imposition of conditions, for the preservation or planting of trees and to make such tree preservation orders under s. 60 as may be necessary in connection with the grant of such permission to give effect to the conditions imposed.

Section 60(1) says:

'If it appears to a local planning authority that it is expedient in the interests of amenity to make provision for the preservation of trees or woodlands in their area, they may for that purpose make [a tree preservation order] with respect to such trees . . . as may be specified in the order; and, in particular, provision may be made by any such order — (a) for prohibiting . . . the cutting down, topping, lopping or wilful destruction of trees except with the consent of the local planning authority . . .'

I need not refer to the remainder of s. 60.

Section 62 deals with the replacement of any tree in respect of which a tree preservation order is in force. If such a tree is removed or destroyed in contravention of the order, it is the duty of the owner of the land, unless he obtains dispensation from the local authority, to plant another tree of an appropriate size and species at the same place as soon as he reasonably can. Section 102 is the section whereby the provisions of s. 60 are enforced and s. 103 relates to the enforcement of s. 62.

In my judgment these sections demonstrate that Parliament intended that no tree the subject of a tree preservation order should be cut down or wilfully destroyed or topped or lopped in such a manner as to be likely to destroy it without the consent of the local authority. Plainly it is of the utmost public importance that such trees should be preserved. The risk to their continued existence in these days of extensive building operations, which encroach further and further into rural areas, is very great. It is not a difficult task for any member of the public wishing to interfere with the shape, size or continued existence of a tree to obtain from the local authority reliable information on the question whether the tree is the subject of a preservation order and, if so, to seek the authority's consent to the operation proposed. (Mrs Twydell appears to have made a most perfunctory inquiry of the wrong department of the local authority and to have misunderstood or misinterpreted whatever it was she claims to have been told.) Thus, there can be no hardship to a member of the public in having on or near land which he owns or occupies any protected tree.

For these reasons, in my judgment, s. 102(1) is a section to which in the words of Wright J., in *Sherras v. De Rutzen* (2) can be applied:

(2) 59 J.P. 440; [1895] 1 Q.B. 918

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'There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered . . . [The] principal classes of exceptions may perhaps be reduced to three. One is a class of acts which . . . are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty.'

I need not refer to the two other classes of exceptions he mentions. In *Sweet v. Parsley* (3) Lord Reid referred to Wright J's words in *Sherras v. De Rutzen* (2). He said:

'In the absence of a clear indication in the Act that an offence is intended to be an absolute offence, it is necessary to go outside the Act and examine all relevant circumstances in order to establish that this must have been the intention of Parliament. I say "must have been", because it is a universal principle that if a penal provision is reasonably capable of two interpretations, that interpretation which is most favourable to the accused must be adopted. What, then, are the circumstances which it is proper to take into account? In the well-known case of *Sherras v. De Rutzen* (2), Wright, J., only mentioned the subject-matter with which the Act deals. But he was there dealing with something which was one of a class of acts which "are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty". It does not in the least follow that, when one is dealing with a truly criminal act, it is sufficient merely to have regard to the subject-matter of the enactment. One must put oneself in the position of a legislator. It has long been the practice to recognise absolute offences in this class of quasi-criminal acts, and one can safely assume that, when Parliament is passing new legislation dealing with this class of offences, its silence as to mens rea means that the old practice is to apply.'

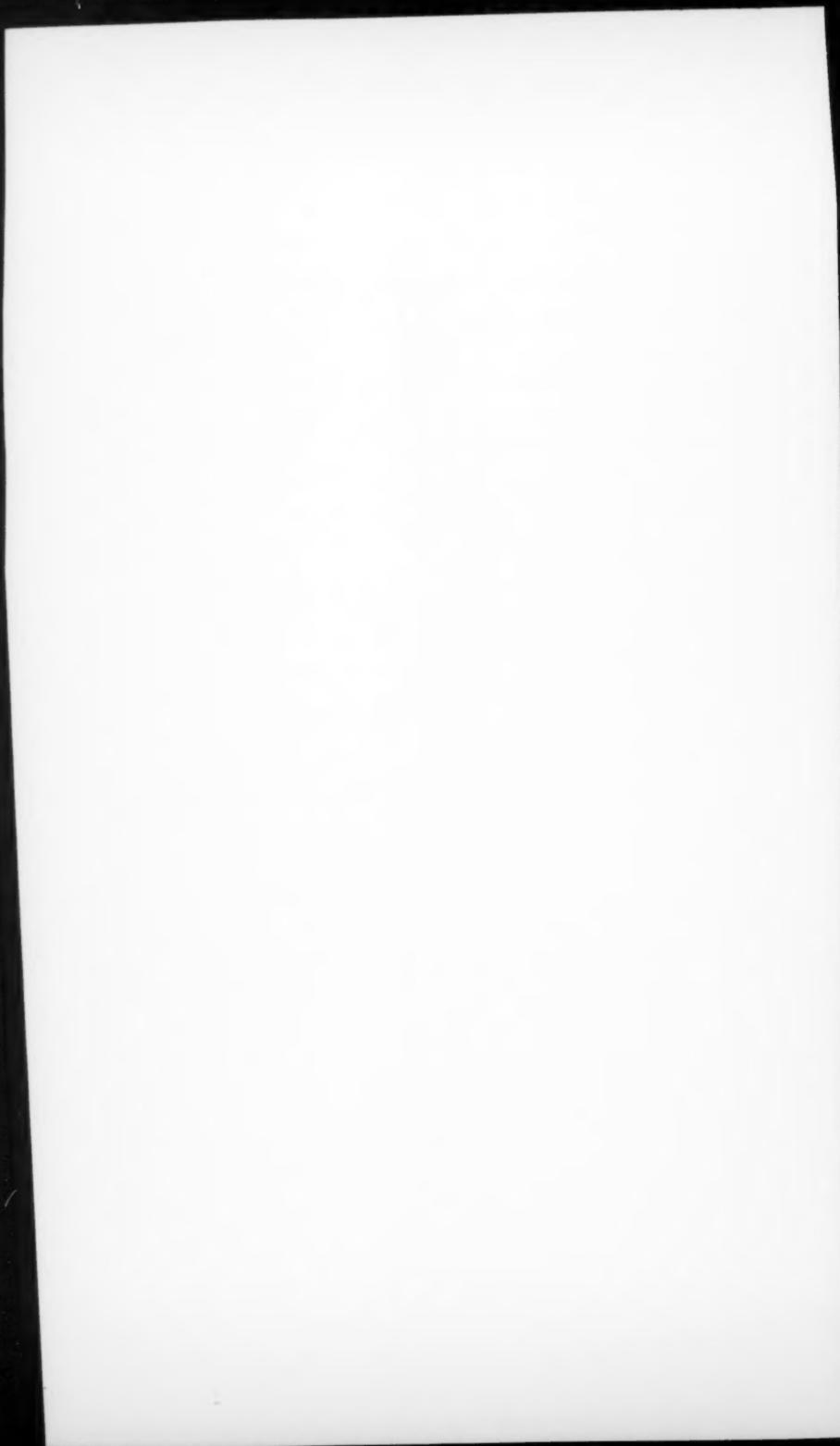
In deciding whether this section of the 1971 Act is one to which 'the old practice' is to be applied, I think it is right to bear in mind that if it were the law that no conviction could be obtained under s. 102(1) unless the prosecution could discharge the often impossible burden of proving that the accused knew of the existence of the relevant tree preservation order that subsection would have little, if any, deterrent effect, so that protected trees could be felled or otherwise destroyed without any appreciable risk of a penalty being incurred by the wrong-doer.

The question is: Is the language of s. 102(1) reasonably capable of two interpretations, so that the interpretation most favourable to the accused must be adopted? In my judgment, having regard to the nature of the tree preservation sections of the 1971 Act, to the mischief with which those sections was intended to deal, and to the fact that the

(2) 59 J.P. 440; [1895] 1 Q.B. 918

(3) 133 J.P. 188; [1969] 1 All E.R. 347; [1970] A.C. 132





section relates to 'acts which in the public interest are prohibited under a penalty', s. 102(1) is not capable of two interpretations. I do not think that the section was intended to be interpreted or should be interpreted as making the cutting down or wilful destruction of a tree or the topping or lopping of a tree in such a manner as to be likely to destroy it an offence only if the accused had knowledge of the existence of the preservation order. In my judgment, no such proof is necessary.

For these reasons, I would allow the appeal and, on the facts found, direct the justices to convict the respondent on the information. It is, I think, right to add, first, that as the respondent was evidently misled by the information he had received from Mrs Twydell that fact can be reflected in the penalty imposed on him, and, second, that no criticism of the justices' decision can be or is made, since the point on which the appeal in my view is allowed was either not taken or not fully argued before them.

WALLER, L.J.: I agree with the judgment which has just been delivered. I only add a few words to deal with an argument advanced on behalf of the respondent. It was argued that the words 'in contravention of a tree preservation order' which occur in s. 102(1) of the Town and Country Planning Act, 1971, indicated that it was necessary to prove conscious contravention, and reliance was placed on some observations of Lord Evershed in *Lim Chin Aik v. R* (4). Section 62(1) of the 1971 Act, which deals with replacement, reads:

'If any tree in respect of which a tree preservation order is for the time being in force, other than a tree to which the order applies as part of a woodland, is removed or destroyed in contravention of the order ...

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[then follow some provisions about cutting down which is authorised, and the subsection concludes:]

it shall be the duty of the owner of the land, unless on his application the local planning authority dispense with this requirement, to plant another tree of an appropriate size and species at the same place as soon as he reasonably can.'

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It is clear, from both that subsection and s. 103, that the phrase 'in contravention of' applies to any felling other than felling authorised by the appropriate authority. The phrase therefore covers not only felling which is done with knowledge of a tree preservation order but also felling which was done in ignorance of a tree preservation order. The same meaning would, in my opinion, clearly be given to the same phrase in s. 102(1).

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co*, for K.B. Rogers, Maidstone's *Hallett & Co*, Ashford.

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Reported by G.F.L. Bridgman, Esq., Barrister.

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Education – Attendance at a course – Award by education authority – Person "ordinarily resident" in United Kingdom for three years – Education Act, 1962, s. 1. – Local Education Authority Regulations, 1979, reg. 13(a).

The applicants, N and J, who had both been born in Kenya, sought under s.1 of the Education Act, 1962, from the local education authority awards in respect of their attendance at certain educational courses. In both cases they were refused on the ground that neither applicant had been "ordinarily resident" in the United Kingdom for three years, and they applied for orders against the authority of certiorari and mandamus in respect of those decisions.

The applicant N had been living in London since 1976 in a house belonging to his father, grandfather, and an uncle. He attended places of education, had passed his O and A levels in various subjects, and had been accepted by an institute for science and technology to read for a B.Sc degree. There were no conditions limiting his stay in the United Kingdom. He had resided in the United Kingdom since August, 1976, for all purposes including settlement as that word was used in immigration law. He was a citizen and passport-holder of Kenya and had returned to the home of his parents in Nairobi for holidays.

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The applicant J was refused an award on the ground that he had been permitted to enter this country only on the basis that he had been accepted for and intended to follow a course of study at a college within the area of the authority and during the time he had been in that area he had pursued the studies for which he was given his original clearance; he would be required to leave this country on the completion of his studies and expiry of extensions of his original entry clearance. His parents had remained resident in Nairobi where was the applicant's real home.

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Held: the concept of "original residence" embodied a number of different factors such as time, intention, and continuity, each of which might carry a different weight according to the context in which and the purpose for which the phrase was used in a particular statute; in reg. 13(a) of the Local Education Authority Awards Regulations, 1979, "ordinarily resident" was used to distinguish between those who were resident for general purposes and those who were resident for a specific or limited purpose, and so an important, though not the only, element to be considered in ascertaining whether an individual was ordinarily in the United Kingdom for the purposes of reg. 13(a) was the purpose of or the reason for his presence in the United Kingdom and his intention in coming and remaining here; if he was in this country for a specific or limited purpose rather than the general purpose of living here he would not be "ordinarily resident" within the meaning of reg. 13(a).

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Applying these tests in the case of N there was no evidence on which the education authority could properly decide that he had not been ordinarily resident in the United Kingdom for the relevant period and so was not eligible for an award under the Act of 1962, and his application would be granted, but in the case of J the evidence clearly established that he came to the United Kingdom as a student for a specific or limited purpose, and his application would be refused.

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Applications by Nilish Shah and Jitendra Shah for orders of certiorari and mandamus directed to the London Borough of Barnet as local education authority.

A Lester, Q.C. and K.S. Nathan for the applicants;
A Scrivener, Q.C., and R.A. Barratt for the authority;
S.D. Brown as amicus curiae.

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18th July, 1980. ORMROD, L.J., read the following judgment of the court: In these two cases, which raise the same point of law and have been heard together, Mr Nilish Shah and Mr. Jitendra Shah apply by way of judicial review for orders of certiorari and mandamus in respect of decisions by the London Borough of Barnet, in its capacity as local education authority, that neither of the applicants is eligible for an award (or grant) under s. 1 of the Education Act, 1962. Regulation 13(a) of the Local Education Authority Awards Regulations, 1979, made under this Act provides:

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'An authority shall not be under a duty to bestow an award in respect of a person's attendance at a course—(a) upon a person who has not been ordinarily resident, throughout the three years preceding the first year of the course in question, in the United Kingdom or, in the case of such a person as is mentioned in reg. 9(1)(b), has not been so resident in the European Economic Community ...'

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In each case the ground for refusing to make an award was that the applicant had not been ordinarily resident throughout the preceding three years in the United Kingdom. The present applications, therefore, turn on the construction of that familiar phrase 'ordinarily resident' which seems so convenient to the draftsman but proves difficult and troublesome to everyone who has to consider and apply it. The question is of great importance to all local education authorities and to many students. Both applicants, by leave of the court, have amended their applications to ask in the alternative for various declarations.

The two Shabs are in no way related or connected with each other and their cases differ significantly on their facts. For convenience we shall refer to them as 'Nilish' and 'Jitendra' respectively, and to the London Borough of Barnet as the 'local education authority'.

Counsel who has appeared for both applicants has put their respective cases succinctly, and with force and clarity, for which we are grateful. He submitted that we should follow, though with due caution, the three well-known tax cases, *Levene v. Inland Revenue Comrs* (1), *Inland Revenue Comrs v. Lysaght* (2), and *Miesegae v. Inland Revenue Comrs* (3), reject the 'real home' test suggested by Karminski, J., in *Stransky v. Stransky* (4), and give the words their natural and ordinary meaning. Counsel for the local education authority, on the other hand, submitted with equal force and brevity that we should adopt the 'real home' test and not follow the tax cases. Alternatively, we should con-

- (1) [1928] AC 217
(2) [1928] AC 234
(3) (1957), 37 Tax Cas 493
(4) [1954] 2 All ER 536; [1954] P.428

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strue the words in their legislative context. Counsel who appeared as amicus curiae, mainly on questions of immigration law, has also helped us on the main issue. He supported counsel for the local education authority on the tax cases and submitted that they should not be regarded as of general application because tax law accepts the concept that a person may be 'ordinarily resident' in more than one place at the same time, a concept which is not applicable in the present context or in other contexts in which this phrase is used. We are grateful to him for his assistance.

We have not found the tax cases very helpful in the solution of our present problem because they were concerned with a different situation. Each decides only that there was evidence on which the Special Commissioners could find 'ordinary residence' as a matter of fact. Much of the speeches and the judgments, though of the highest authority, are, therefore, essentially obiter dicta. Nor do we derive much assistance from *Stransky v. Stransky* (4) which was, again, concerned with a different situation. We do not think that Karminski, J., intended his use of the phrase 'real home' to be of general application. We have also experienced considerable difficulty in ascertaining the 'natural and ordinary' meaning of the words in question. To determine the 'ordinary' meaning of 'ordinarily' is something of a linguistic feat in itself. Nor is the word 'resident' at all easy. It is not much used in ordinary speech, and then without precision. In these circumstances we think that the problem is best approached from first principles. Any tentative conclusion as to construction can then be examined in the light of the reported cases.

Our task is to construe the phrase 'ordinarily resident' in its legislative context, giving the words, so far as possible, their natural and ordinary meaning in that context. Section 1 of the 1962 Act, so far as material, reads:

'(1) It shall be the duty of every education authority, subject to and in accordance with regulations made under this Act, to bestow awards on persons who—(a) are ordinarily resident in the area of the authority, and (b) possess the requisite educational qualifications, in respect of their attendance at courses to which this section applies ...'

Regulation 13(a) limits the scope of this duty to persons who have been ordinarily resident throughout the preceding three years in the United Kingdom. There are, therefore, two classes of person differentiated by the phrase 'ordinarily resident'. To be eligible for an award a person must not only be 'resident' in the United Kingdom, he must also be 'ordinarily resident', and in a position to show that he has had this quality of residence for the three years immediately preceding the beginning of his course of study.

The 1962 Act, in s. 1, provides for bestowing awards on certain persons. 'Bestow' is an unusual word to find in an Act of Parliament

and carries a special connotation. It is commonly used in connection with words such as 'bounty' or 'favours' or some similar charitable or quasi-charitable act. It is, therefore, to be expected that Parliament intended to distinguish between persons whose connection with the United Kingdom was sufficiently close to justify their being helped or supported by awards from public funds to pursue their studies in the United Kingdom and those whose connection lacked this quality. Mere residence, even for a period of three years, would not be enough; the residence must have a certain quality; that quality is identified by the use of the word 'ordinarily'.

The phrase 'ordinarily resident' is used in a variety of legislative contexts. It has become, in fact, a point on a scale which ranges from mere presence in this country through 'resident', 'ordinarily resident', 'habitually resident' to 'domicile' which is widely used to specify the nature and quality of the association between person and place which brings the person within the scope of the particular enactment. Mere presence within the jurisdiction is enough to permit good service of a writ or other forms of process in most cases; in some, e.g. the Carriage by Air Act, 1961, more is required. Article 28 of the Warsaw Convention specifies the defendant's ordinary residence or principal place of business as the prerequisite for jurisdiction. Residence alone is enough for the Representation of the People Act, 1949. Habitual residence for one year or domicile is required to give jurisdiction in matrimonial proceedings (see the Domicile and Matrimonial Proceedings Act, 1973, s. 5). Habitual residence or nationality is required for the recognition of foreign divorces (see Recognition of Divorces and Legal Separations Act, 1971, s. 3).

What then are the characteristics of ordinary residence which distinguish it from residence without this qualification? In answering this question we have derived great assistance from the judgment of Smith, J., in *Clarke v. Insurance Office of Australia* (5), a case in the Supreme Court of Victoria. We cannot do better than to read in full what he said:

'The words "ordinarily residing with" are common English words and here there is no context requiring that they should be given other than their natural meaning in accordance with the accepted usage of English. Even in such circumstances, however, there can be difficulty and doubt as to their applicability to particular sets of facts, because the conception to which the words have reference does not have a clearly definable content or fixed boundaries. It is a conception as to the extent of the association and the strength of the connection between two persons as members of one household or domestic establishment; and whether the extent and strength of the connection are such, in any given case, as to make the words fairly applicable, is a question of degree. Moreover that question depends upon an assessment of a combination of factors; and combinations may be found to be adequate though they differ widely, both in the weighting of factors and in the identity of the factors present. The situation is similar to that discussed by Rand, J.,

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in the following passage from his judgment in *Thomson v. Minister of National Revenue* (6) where the expression under consideration was "ordinarily resident": "The enquiry lies between the certainty of fixed and sole residence and the uncertain line that separates it from occasional or casual presence, the line of contrast with what is understood by the words 'stay' or 'visit' into which residence can become attenuated; and the difference may frequently be a matter of sensing than (*sic*) of a clear differentiation of factors. The gradation of degree of time, object, intention, continuity and other relevant circumstances, shows, I think, that in common parlance 'residing' is not a term of invariable elements, all of which must be satisfied in each instance. It is quite impossible to give it a precise and inclusive definition. It is highly flexible, and its many shades of meaning vary not only in the contexts of different matters, but also in different aspects of the same matter. In one case it is satisfied by certain elements, in another by others, some common, some new." The duration of residence and the comparative times spent in different places or households, will, of course, commonly be a great importance, but they are not factors which are necessarily decisive. They may be outweighed by other factors: compare *Levene v. Commissioners of Inland Revenue* (1), *Commissioners of Inland Revenue v. Lysaght* (2), *Thomson v. Minister of National Revenue* (6), *Hopkins v. Hopkins* (7), *Judd v. Judd* (8). In some circumstances, for example, a man may properly be said to be "ordinarily residing" at a place immediately after he begins to reside there. For it may be his intention to reside there permanently and he may have severed his connections with all previous places of residence: cf. *Macrae v. Macrae* (9), *Lewis v. Lewis* (10). To take another illustration, if a ship's officer spends all but a few weeks of the year at sea, and spends those weeks with his wife and children in the home in which they live, it would be an appropriate use of language to say that he ordinarily resided with his wife; compare *In re Young* (11). And the same would be true of, say, a wool buyer whose occupation prevented him from being at home with his wife and family for more than a few weeks in the year, and who followed a regular round of sales and spent longer periods lodging at particular hotels than at the home. In such cases the strength of the bond that ties the man to his family and their household makes up for the short duration of his stays in the home. Again if a person has once become so connected with a particular household that it would be regarded as his permanent home, and absence from it, even if of long duration and spent in only one other household, will not, in general, be regarded as changing the place where he ordinarily resides, so

(1) [1928] AC 217

(2) [1928] AC 234

(6) [1946] SCR 209

(7) [1950] 2 All ER 1035; [1951] P. 116

(8) (1957) 75 WN (NSW) 147

(9) [1940] 2 All ER 34; [1949] P 397

(10) [1956] 1 All ER 375; [1956] 1 WLR 200

(11) [1875] 1 Tax Cas 57

long as the move is for a special limited purpose and is not intended to be permanent or to continue indefinitely: compare, as regards the relative unimportance of a "residing" which is for a special purpose and not for general purposes of living with "its accessories in social relations, interests, and conveniences": *Thomson v. Minister of National Revenue* (6) and *In re Young* (11); and in relation to the continuing importance of the connection with a permanent home until there is clear severance [then there is a reference to several other cases].ⁱ

We think that the most significant point which emerges from this analysis is that the concept of 'ordinary residence' embodies a number of different factors such as time, intention and continuity, each of which may carry a different weight according to the context in which, and the purpose for which, the phrase 'ordinarily resident' is used in a particular statute. An illustration of this is to be found in the National Service Act, 1948, s. 34(4), which, exceptionally, defines 'ordinarily resident' as excluding residence 'only for the purposes of attending a course of education', and residence for 'a temporary purpose only'.

Some help may be obtained from the relevant entries in the dictionaries. For example, the Shorter Oxford Dictionary shows that the words 'ordinary' or 'ordinarily' may be used as the antonym of 'exceptional' or 'special' or 'extraordinary' or as a synonym for 'regular'. In each case the shade of meaning is different and, as Smith, J., pointed out, one shade may be appropriate in one legislative context and another in another. We think that in reg. 13(a) 'ordinarily resident' is used to distinguish between those who are resident for general (i.e. ordinary) purposes, and others who are resident for a specific or limited purpose.

There is nothing in the tax cases, *Levene v. Inland Revenue Comrs* (1) and *Lysaght v. Inland Revenue Comrs* (2), when carefully examined, which is inconsistent with this provisional conclusion although there are obiter dicta which at first sight might appear to be. The House of Lords was not really concerned in either case with the distinction between 'resident' and 'ordinarily resident'. Both cases were primarily concerned with the meaning of 'resident'; 'ordinarily resident' was a subsidiary issue to which little attention was paid. The main issue was whether the individuals concerned were entitled to exemption from income tax on interest on securities of British possessions under r. 2(d) of the General Rules applicable to Sched. C, as persons 'not resident' in the United Kingdom; the subsidiary question arose under the Income Tax Act, 1918, s. 46, which exempted persons not 'ordinarily resident' in the United Kingdom from income tax on interest on war loan. It might have seemed a little anomalous if Mr. Levene and Mr. Lysaght had been subject to tax on their income from securities of British possessions yet not subject to tax on the interest from their holdings of war loan.

- (1) [1928] AC 217
(2) [1928] AC 234
(6) [1946] SCR 209
(11) (1875) 1 Tax Cas 57

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These cases have been cited very frequently as authority for the meaning of 'ordinarily resident', almost always for the dicta which are to be found in the speeches. Insufficient attention has been paid, in our view, to the reasons given by the Special Commissioners for finding that these two men were resident and ordinarily resident in this country. In the case of *Levene* (1) the Special Commissioners' reasons are given and they read as follows:

'These are in our opinion questions of degree, and taking into consideration all the facts put before us in regard to the appellant's past and present life, the regularity and length of his visits here, his ties with this country, and his freedom from attachments abroad, we have come to the conclusion that at least until January, 1925, when the appellant took a lease of a flat in Monte Carlo, he continued to be resident in the United Kingdom. The claims for the years in question therefore fail.'

In *Lysaght's* case (2) the reasons refer specially to his former ties with this country, to the length of time spent by him in this country during the year in question, and to the regularity of his visits.

We were also referred to the case of *Miesegaes v. Inland Revenue Comrs* (3), another case under s. 46 of the 1918 Act, in which a schoolboy at Harrow was held to be 'ordinarily resident' in this country. The facts are altogether unusual. The boy came to this country with his father as a refugee from Holland in 1939. As an extra-statutory concession, the father was not regarded as ordinarily resident. In 1946 he went to live in Switzerland but died there in July, 1948. The question was whether the boy was ordinarily resident in this country during the years 1947-48 to 1951-52. After his father's death the boy had no home anywhere but spent by far the greater part of his time in England either at school or with an aunt or with his former governess. It was submitted that his presence here during the relevant period was for the special purpose of schooling, but the Special Commissioners rejected that submission because

'in our opinion that consideration did not in the circumstances of the case point very strongly to the conclusion that he was not resident here'

In our opinion the judgments in the Court of Appeal must be read in the light of these very unusual circumstances of a schoolboy with no alternative residence but his boarding school. Plainly he was not here for the special purpose of education; after his father's death he had nowhere else to go. On the special facts of the case the observations of both Pearce and Morris, L.J.J., as to the meaning of 'ordinarily resident' were entirely appropriate. As statements of general application they were, in our view, too widely expressed, and, being in the context obiter dicta, are not binding on us.

(1) [1928] AC 217

(2) [1928] AC 234

(3) (1957), 37 Tax Cas 493





In *Stransky v. Stransky* (4) Karminski, J. had to construe the meaning of 'ordinarily resident' in the context of the Matrimonial Causes Act, 1950, s. 18(1)(b), which gave the court jurisdiction to grant a decree of divorce to a wife not domiciled here, who had been ordinarily resident in England for three years immediately preceding the filing of her petition. During the three-year period she was away from this country for fifteen months living with her husband in temporary accommodation in Munich due to the exigencies of her husband's employment but returning from time to time to the flat which was never let but kept ready for her occupation. She was held to have been ordinarily resident here during the whole period. The learned judge said:

'I can find no intention on the wife's part to make Munich her home for an indefinite period.'

The case is constantly cited as authority for the 'real home' test, but it is clear from the judgment that this was just one of the tests and the one which seemed most appropriate on the facts of that case.

Macrae v. Macrae (9) is an illustration of the weight which, in a proper case, may be given to intention. Mr. Macrae established ordinary residence in Scotland immediately on his return there from England following the breakdown of his marriage because, from that moment, he intended to make his home in Scotland for an indefinite period.

Hopkins v. Hopkins (7) is sometimes cited for the proposition that the addition of the adverb 'ordinarily' lends no added meaning to the word 'resident'. Pilcher, J., actually said:

"on the facts of this particular case at least—the qualifying adverb 'ordinarily' adds nothing to the adjective 'resident'."

Fox v. Stirk (12) does not throw any light on the present problem. It merely established that a student at a university is 'resident' in the area of the university for the purposes of the Representation of the People Act, 1949.

It is convenient, at this stage, to deal with a subsidiary argument put forward by counsel for the applicants based on s. 34(4) of the National Service Act, 1948. He submitted that this section demonstrates that when Parliament intends to restrict the meaning of the words 'ordinarily resident' it does so by express enactment. Apart from the principle that one Act is not to be construed by reference to other and unconnected legislation, it seems probable that in the National Service Act Parliament was anxious to make doubly sure that persons not intended to be subject to national service were not caught by the ambiguity of the words themselves. It is a pity that this precedent is not followed more often when draftsmen use, as they so often do, this deceptively simple phrase.

(4) [1954] 2 All ER 536; [1954] P. 428

(7) [1950] 2 All ER 1035; [1951] P. 116

(9) 113 JP 342; [1943] 2 All ER 34; [1949] P. 397

(12) 134 JP 576; [1970] 3 All ER 7; [1970] 2 QB 463

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In our judgment, therefore, an important, though not the only, element to be considered in ascertaining whether an individual is 'ordinarily resident' in the United Kingdom for the purposes of reg. 13(a) is the purpose of, the reason for, his presence in the United Kingdom and his intention in coming and remaining here. 'Why is he in this country?' is a relevant question. If the answer is for a specific or limited purpose, rather than the general purposes of living here, he will not be 'ordinarily resident' within the meaning of this regulation.

The facts of each case must now be considered separately.

NILISH

Nilish Shah was born in Kenya on 15th July, 1959. He is a citizen of Kenya and holds a Kenyan passport issued to him on 14th July, 1976. His parents were then living in Kenya and are citizens of the United Kingdom and colonies. On 1st August, 1976, his father obtained from the British High Commission in Nairobi, a 'special voucher' entitling him to enter the United Kingdom for 'settlement' within the meaning of the Immigration Act, 1971. On the same day his mother obtained an entry certificate marked 'Accompany Husband-Settlement'. Nilish himself was given an entry certificate on the same day marked 'Accompany Parents-Settlement'. The family arrived at Heathrow on 7th August, 1976. All three were given leave to enter for an indefinite period.

Nilish has been living at New Southgate in London since that date. The house belongs to his father, grandfather and an uncle. He attended the Hendon College of Further Education from September, 1976, to June, 1977, and Southgate Technical College from September, 1977, to June, 1979, and has passed his O and A levels in various subjects. He has been accepted by the University of Manchester Institute for Science and Technology to read for a BSc degree in management science. He started this course on 2nd October, 1979. His name now appears on the electoral roll for the area in which he lives. He states in his affidavit that he is 'settled' in the United Kingdom, and that there are no conditions limiting his stay in this country. In August, 1979, he applied to the local education authority for a major award under the Education Act, 1962. The evidence, therefore, appears to indicate that he has been resident in the United Kingdom since 7th August, 1976, for all purposes, including 'settlement' as that word is used in immigration law. He has not been living with his parents. They returned to Kenya five weeks after their arrival in this country. Their passports show that they left on 10th September, 1976, since when they have been living in Kenya. Both are entitled to 'readmission' to the United Kingdom if they wish. Nilish has returned to Kenya during the summer holidays each year.

The local education authority's decision on his eligibility for an award was conveyed in a letter dated 28th August, 1979. The letter reads:

'I refer to your application for a major award to assist you with your proposed course of study. To qualify for a major award a student must have been ordinarily resident in the United Kingdom

for three years prior to 1st September in the year the course commences. In accordance with guidance from the Department of Education and Science and from information available it appears that your real home is not in the United Kingdom and, thus, you fail to fulfil the requirements of this regulation. I, therefore, write to advise you that your application cannot be approved.'

The reasons for this decision are given in an affidavit, sworn by Mr. Jack Dawkins, the director of educational services, on 26th February 1980. They read as follows:

'13. The matters taken into consideration by the authority in determining as a matter of fact whether the applicant was ordinarily resident in its area in September 1979 were that:—(a) The applicant had permission to enter the United Kingdom as a dependent of his parents whom, on the occasion of his entry, he had accompanied, they being admitted for settlement. (b) His parents however left the United Kingdom only 5 weeks later on the 10th September, 1976, and have not returned since that date. (c) The applicant is now over 18 years of age and his parents have not been resident in the United Kingdom for a period of more than two years nor had they lived in this country for most of their lives, when they left. (d) The applicant is a citizen of the republic of Kenya and a passport holder of that country. (e) He has regularly returned to the home of his parents in Nairobi during each of the summer holiday periods during his full time course of studies in this country. (f) Since August, 1976, the applicant has been continuously engaged in studies at colleges of further education in the authority's area for which purpose he has remained in this country.

'14. At the time of his application to the authority, the applicants' parents were no longer settled in the United Kingdom and his circumstances have therefore changed from those that obtained upon his original entry into this country. It appeared to the authority that the applicant's real home was in Nairobi in Kenya to which he returned in the summer holidays.'

The local education authority are not to be criticised for applying the 'real home' test, because they were following the advice of the Department of Education and Science in a circular dated 27th January, 1978. Nor is the department, because the authorities are not in a satisfactory state. However, for reasons given above, we do not think that the 'real home' test by itself is particularly helpful; it is certainly not conclusive.

The return of the parents to Kenya after such a brief stay makes this case quite exceptional. We think that the only ground for saying that Nilish's real home is in Kenya would be the assumption that the 'real home' of young people aged 17 or 18 (Nilish was 17 on arrival) is with their parents. Even assuming that the local education authority applied the right test, we do not think there is any evidence to support their decision. Applying what we hold to be the correct test, and in the absence of any suggestion that the father and mother did not intend to settle in the United Kingdom, the only proper inference appears to be

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that Nilish came to this country for the purpose of settling here, ie for all ordinary purposes of living and not for the specific purpose of being educated here, and has been so residing here since August 1976. We would hold that, on the material before us, there is no evidence on which the local education authority could decide that he was ineligible for an award under reg. 13(a).

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JITENDRA

Jitendra's case has significant differences on its facts. He, too, was born in Kenya, and at almost the same time, 19th July, 1959. He is a citizen of the United Kingdom and colonies, but has no right of entry to this country. On 20th June, 1976, he was granted a student's entry certificate by the British High Commission in Kenya. He arrived at Heathrow on 26th August, 1976, and was given leave to enter the United Kingdom for two months on condition that he did not enter employment or engage in any business or profession. This leave has been extended on the same basis from time to time. His parents still live in Kenya. Since his arrival he has been living in London N12 at the home of his brother, Mr D U Shah. From September, 1976, to July, 1979, he was a student at Southgate Technical College. He has A levels in four subjects. He has obtained a place at Newcastle University to read for a degree in dental science. He applied to the local education authority for an award under s. 1 of the 1962 Act but his application was rejected. The local education authority's decision was conveyed to him in a letter dated 1st August 1979. It is in precisely the same terms as the letter to Nilish, quoted above. In his affidavit in this case, Mr Jack Dawkins summarised the reasons for the local education authority's decision as follows:

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'12. The matters taken into consideration by the authority in determining as a matter of fact whether the applicant was ordinarily resident in its area in September 1979 were that:— (a) The applicant had permission to remain in this country only as a student for a limited period. (b) The applicant had been permitted to enter this country only upon the basis that he had been accepted for and intended to follow a full time course of study at a college within the authority's area. (c) The applicant was able to meet the cost of his course and his own maintenance. (d) the applicant will be required to leave the country on the completion of his studies and expiry of extensions to his original entry clearance. (e) The applicant's parents have remained resident at their home in Nairobi in Kenya. (f) Throughout the period in which the applicant has remained in the authority's area he had pursued the course of studies for which he was given his original entry clearance.

'13. Upon consideration of each and all these matters the authority concluded that the real home of the applicant was in Nairobi in Kenya and determined to refuse his application for a major award, which refusal was notified to the applicant by letter dated the 1st August 1979.'

It is clear that para. 12(a), (b) and (d), contain the substantive ground for deciding that Jitendra was not ordinarily resident in the

United Kingdom over the period of three years, although in para. 13 Mr Dawkins refers to the 'real home' test. We need not repeat our comments on this. In our judgment the evidence clearly establishes that Jitendra came to this country as a student, for a limited period only, and for a specific or limited purpose, namely, to study and, if possible, obtain a professional qualification. For this purpose the terms on which he was permitted by the immigration authorities to enter the United Kingdom are evidence, and strong evidence, of his purpose in coming here and the reasons why he has remained here since 1976. His immigration status is not in itself conclusive, but it justifies this inference.

It is only necessary to refer briefly to the immigration rules. The Statement of Immigration Rules for Control on Entry: Commonwealth Citizens (HC Paper (1972-73) no. 79) treats students as 'passengers coming for temporary purposes'. Rule 18 requires the applicant for entry clearance to satisfy the officer that he had been accepted for a course of full-time study, and that he can meet the cost of the course and of his own maintenance. Under r. 19 he must satisfy the officer that he intends to leave the country on completion of the course. The Statement of Immigration Rules for Control after Entry: Commonwealth Citizens (HC Paper 1972-73 no. 80) provides in r. 13 that on an extension of leave the student 'may be reminded that he will be expected to leave at the end of his studies'.

The contrast between these two cases brings out very clearly the difference between 'resident' and 'ordinarily resident' in the legislative context of reg. 13(a). Nilish's answer to the question 'Why are you here?' would be 'To live, to study and to remain'; Jitendra's answer could only be 'To study, to qualify if possible and then to leave'.

We are fortified in our construction of this regulation by the reflection that it is almost inconceivable that Parliament could have intended to bestow major awards for higher education, out of public funds, on persons permitted to enter this country on a temporary basis, solely for the purpose of engaging in courses of study at their own expense. Such an improbable result is not to be accepted if it can properly be avoided.

The conclusion, therefore, is that in the case of Nilish there was no evidence before the local education authority on which they could properly decide that he had not been ordinarily resident in the United Kingdom for the relevant period, and that he was ineligible for an award under the Act. In the case of Jitendra, on the other hand, there was evidence which entitled the local education authority to decide that he was ineligible for such an award on the ground that he had not been ordinarily resident in this country for the relevant period or at all.

If necessary we will hear counsel on the form of order in Nilish's case but he appears to be entitled to an order quashing the local education authority's decision of 28th August 1979 and an order directing them to reconsider his application for an award. In the case of Jitendra we dismiss the application for judicial review and for any of the declarations claimed.

Orders accordingly

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Cicutti v.
Suffolk CC
Chanc. Div.

Solicitors: *Jaques & Co; E M Bennett*, Hendon.

Reported by G.F.L. Bridgman, Esq., Barrister.

NOTE

CICUTTI v. SUFFOLK COUNTY COUNCIL

i *Education – Attendance at a course – Award by education authority – Person ordinarily resident in United Kingdom for three years – "Ordinarily resident" – Intention – Sufficiency – Physical or other manifestations.*

A week after the decision in *R. v. London Borough of Barnet – Ex parte Shah* (ante p.50) Sir Robert Megarry, V-C, gave judgment in the Chancery Division in *Cicutti v. Suffolk County Council* which raised the same questions as the *Barnet* case. There follow the salient points of the Vice-Chancellor's judgment.

ii **Megarry, V-C**

On the evidence, he said, it was clear that the plaintiff, Ambrose Cicutti, initially came from Italy, where he was born, to England for the purpose of being educated here. It was not disputed that subsequently he formed the intention of remaining here, and living and working here. It did not appear precisely when or how or why he formed that intention, but the education authority accepted that it occurred at some time before October, 1976, when the three-years period began to run.

His Lordship continued:

(i) From the *Barnet* case it seems clear that 'ordinarily resident' is a concept which requires the examination of a variety of factors, including time, intention and continuity, and that the weight to be given to those factors depends on the context in which the phrase appears, and the purpose for which the statute uses the phrase.

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(ii) The purpose for which the phrase is used in s. 1 of the Education Act, 1962, and reg. 13(a) of the 1979 regulations is, I think, to define the local education authority which is required to make the award, to define the applicants who are entitled to such awards, and to exclude those who lack a sufficient connection with the particular local education authority, or with the United Kingdom, thereby preventing abuses of the system of awards. Quoad the applicant, the statutory provisions are enacted in relation to the conferring of a benefit as contrasted with provisions imposing a burden, such as legislation for taxation or national service.

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(iii) The *Barnet* case establishes that the test is not one of what is the 'real home' of the applicant. Instead, the dividing line is between those who are in this country for some specific or limited purpose, and those who on the other hand are present for the general purposes of living here. What must be ascertained is the purpose of or reason for that presence, and the intention of the person in coming here, and also in remaining here. These are matters which cannot be determined without ascertaining the intention of the person concerned.

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(iv) The *Barnet* case indicates that in the term 'ordinarily resident', the word 'ordinarily' is primarily directed not to duration but to

purpose. The question is not so much where the person is to be found 'ordinarily', in the sense of 'usually' or 'habitually', and with some degree of continuity (as opposed to 'unusually' or 'extraordinarily'), but whether the quality of the residence is 'ordinary' and general, rather than merely for some special or limited purpose. No doubt there must be residence for a sufficient length of time and with a sufficient degree of continuity to be capable of supporting the contention that the residence is ordinary in its quality, but it is that quality of ordinariness which is of the essence, and not the duration or continuity. The Divisional Court rejected indications to the contrary which may be found in Revenue cases such as *Levene v. Inland Revenue Comrs* (1) and *Inland Revenue Comrs v. Lysaght* (2); and on the footing that I was bound by the *Barnet* case, no submissions were put before me on these cases.

(v) It seems to me that the intention to be considered is the intention that exists at the time in question. Under s. 1(1)(a) of the 1962 Act, that time is, I think, the time of the decision by the local education authority, both for general reasons and by reason of the use of the present tense; the verb is 'are'. Under reg. 14(a) of the regulations, the time is the whole of the three-years period. I say nothing about fluctuations of intention during that period, for no such point arises in this case. Intentions which existed previously, or came into being subsequently, do not seem to me to be relevant except so far as they throw some light on the intention at the relevant time. A person who comes to this country with one intention and then asserts that at the relevant time a different intention had come into being may well find it harder to convince the local education authority or the court that a person whose case is based on his original intention having remained unchanged throughout.

(vi) I do not think that there is any requirement that for this purpose an intention must be supported by any particular physical or other manifestation. Provided an intention is genuine, and is a true intention in the sense that the person concerned has at least a reasonable prospect of carrying out what he says that he intends, I think that it can suffice for this purpose. As I have suggested, physical or other manifestations of the intention may play their part in supporting or detracting from the existence of a genuine intention, but I do not regard their presence or absence as being of the essence.

If those are the correct principles, then it is plain that some applicants for awards will have a strong motive for asserting that they have an intention which will entitle them to an award, and so, it may be said, the door to an abuse of the system will stand ajar. As this contention was not advanced in argument I shall not say much about it, but it may assist those concerned if I say something. First, it is clear that motive and intention are distinct; an intention is not vitiated merely because the person forming it has a self-interest in doing so. Indeed, the stronger the motive for forming the intention, the more likely it is that it will truly be formed. The question is whether the intention does exist, and not why it was formed. Secondly, nobody can

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(1) [1928] AC 217
(2) [1928] AC 234

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form a genuine intention to live in this country for general purposes if he has no right to be here save for a limited time and purpose, and no real expectations of having these limitations removed. Thirdly, I would regard it as an important part of the functions of a local education authority to scrutinise with care any such asserted intention, and to investigate any that appears to be doubtful or suspicious. Fourthly, in any case I am bound by the statutory language and, it seems, by the construction put on it by the Divisional Court. If that language, so construed, is considered to be too relaxed, no doubt it will be amended or qualified by a further statutory instrument.

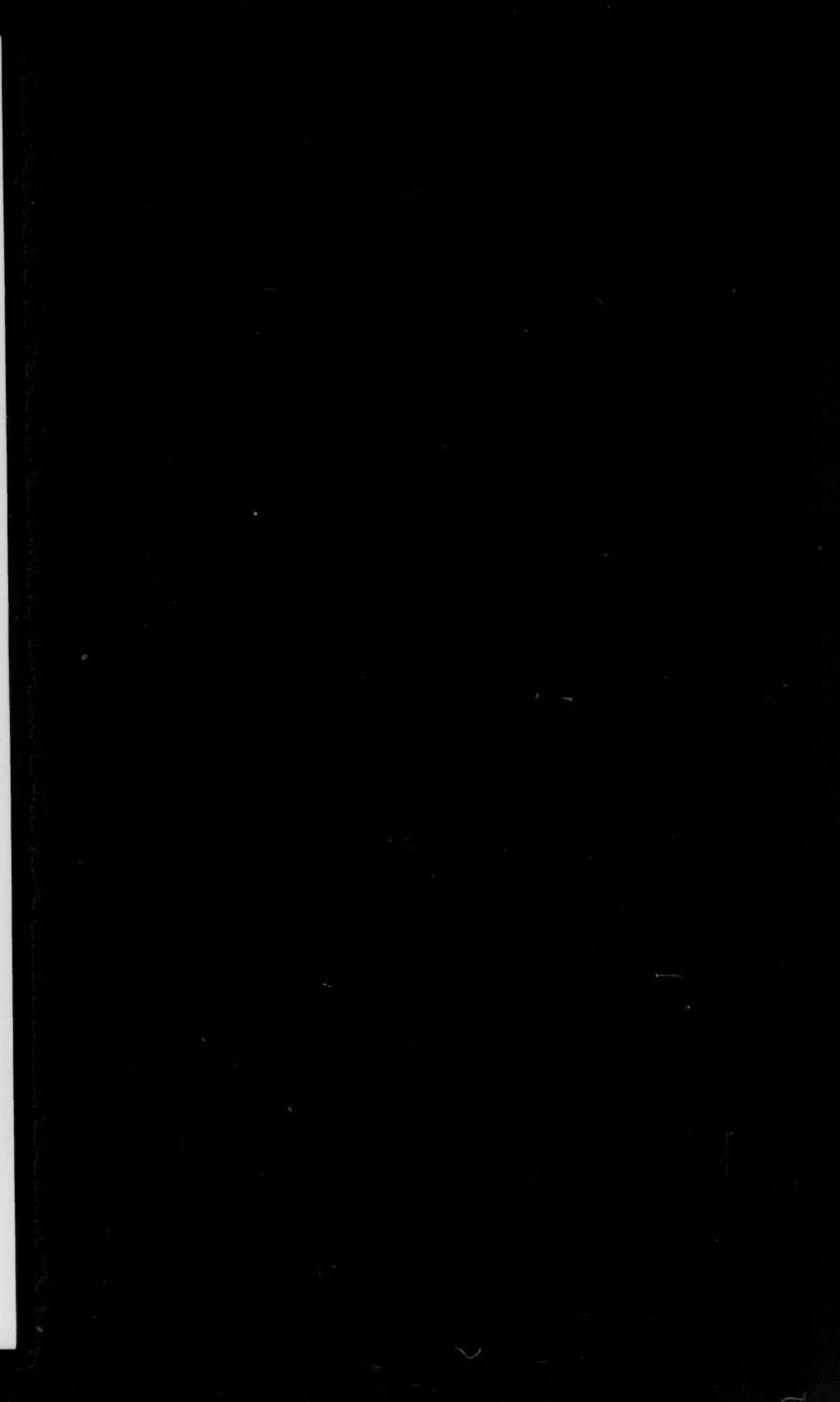
i I return to the facts of the case before me. Counsel for the defendants understandably stressed the plaintiff's Italian origin and connections. His father and his father's home are in Italy; he has no home over here, apart from what has been provided by his school and then his university; he is an Italian citizen with an Italian passport which states his residence to be Rome; he is being maintained from Italy by his father; and until in 1977 he began to spend most of his school holidays here, he spent all of them in Italy. Further, he had no connection with the United Kingdom until he came here, and then he came only for the special and limited purpose of being educated here. I agree that if you look to the past, Italy plainly predominates. But look, as one must, at the three-years period, and look at his intentions and his daily life then, and Italy retreats into the background. It is obviously probable that he will be able to remain here to finish his degree course, and after that the right of establishment will enable him to work here, as he intends. Not only is his intention of remaining here admittedly genuine, and capable of being put into effect, but also, in spending most of his school holidays here and in applying for naturalisation, the plaintiff has been acting in accordance with that intention. The old pattern of his life has been superseded by the new; and, in my judgment, that new pattern was and is a pattern of being here for the general purpose of living here. The mere existence of foreign connections seems to me to be per se of small importance in considering where a person is 'ordinarily resident'; what matters far more is where he moves and dwells and has his being, and for what purposes he does so. His centre of gravity, once in Rome and Italy, came to be in Ipswich and the United Kingdom.

ii As the action is for a declaration and not merely for certiorari, the question is not whether there was or was not sufficient evidence to support the decision of the defendants, but what the relevant rights of the plaintiff are. I shall therefore make a suitable declaration in his favour: the precise terms are for consideration. I will add that if, contrary to the *Barnet* case 'ordinarily' has to be construed in the sense of 'usually' or 'habitually', my present impression is that I would have reached the same conclusion on the facts of this case, unless, indeed, counsel for the defendants had been able to put before me some authority or contention that at the moment I cannot envisage.

iii iv v vi Declaration accordingly

Solicitors: *Iliffe & Edwards*, for *Prettys*. Ipswich; *Sharpe, Pritchard & Co*, for *K O Hall*, Ipswich.

Reported by G.F.L. Bridgman, Esq., Barrister.





HOUSE OF LORDS
(Lord Diplock, Lord Edmund-Davies, Lord Fraser of
Tullybelton, Lord Keith of Kinkel, and Lord Scarman)
November 27, 1980

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House of Lords

R. v. SHEPPARD

Child - Neglect - Unnecessary suffering or injury to health - Charge of offence by parents - Proper direction to jury - Children and Young Persons Act, 1933, s. 1(1).

By s. 1(1) of the Children and Young Persons Act, 1933: "If any person who has attained the age of sixteen years and has the custody, charge, or care of any child or young person under that age, wilfully assaults, ill-treats, neglects, abandons, or exposes him, or causes or procures him to be assaulted, ill-treated, neglected, abandoned, or exposed in a manner likely to cause him unnecessary suffering or injury to health . . . that person shall be guilty of a misdemeanour . . ."

Held: by Lord Diplock, Lord Edmund-Davies and Lord Keith, Lord Fraser and Lord Scarman dissenting: the proper direction to be given to a jury on a charge of wilful neglect of a child under s. 1(1) (*supra*) by failing to provide adequate medical aid is that the jury must be satisfied (i) that the child did in fact need medical care at the time at which the parent was charged with failing to provide it, and (ii) that the parent was aware at that time that the child's health might be a risk if it was not provided, or that the parent's unawareness of this fact was due to his not caring whether his child's health was at risk or not.

Appeals by James Martin Sheppard and Jennifer Christine Sheppard against a decision of the Court of Appeal, Criminal Division, dismissing their appeals against their convictions in the Crown Court, Northampton, of wilfully neglecting their infant child, Martin James Sheppard, contrary to s. 1(1) of the Children and Young Persons Act, 1933.

Smith QC and J M Cartwright for the appellants.
Palmer QC and J H Reddihough for the Crown.

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Their Lordships took time for consideration.

27th November, 1980. The following opinions were delivered.

LORD DIPLOCK. The appellants ('the parents') were convicted in the Crown Court at Northampton of an offence under s. 1(1) of the Children and Young Persons Act, 1933, of wilfully neglecting their infant child, Martin, between 1st July, 1978, and 29th January, 1979, in a manner likely to cause him unnecessary suffering or injury to health.

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The child, who had been a slow developer, died, at the age of 16 months, on 28th January, 1979, of hypothermia associated with malnutrition, a condition which increases the susceptibility of infants to hypothermia. If Martin had received timely medical attention his life might well have been saved. For five days or more before his death he had probably suffered from gastro-enteritis which had caused

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him to vomit up and so fail to ingest the food that had been offered to him, but the details of such symptoms of serious illness as were apparent during the period before his death do not affect the question which falls to be decided by your Lordships in this appeal and is a question of law alone.

The gravamen of the charge against the parents was that they had failed to provide Martin with adequate medical aid on several occasions during the seven months to which the charge related and, in particular, during the week immediately preceding his death. In the light of the trial judge's instructions given to the jury as to the law applicable to the offence charged, it can safely be inferred from the verdicts of guilty that the jury found (i) that injury to Martin's health had in fact been caused by the failure by each of the parents to have him examined by a doctor in the period prior to his death and (ii) that any reasonable parents, i.e. parents endowed with ordinary intelligence and not indifferent to the welfare of their child, would have recognised from the manifest symptoms of serious illness in Martin during that period that a failure to have him examined by a doctor might well result in unnecessary suffering or injury to his health.

The parents, a young couple aged 20 and 22 respectively, occupied poor accommodation, particularly as respects heating, where the family, which included another (older) child, subsisted on a meagre income. They would appear, on the evidence, to have been of low intelligence. Their real defence, if it were capable of amounting to a defence in law, was that they did not realise that the child was ill enough to need a doctor; they had observed his loss of appetite and failure to keep down his food, but had genuinely thought that this was due to some passing minor upset to which babies are prone, from which they recover naturally without medical aid, and which medical treatment can do nothing to alleviate or to hasten recovery.

We do not know whether the jury would have thought that this explanation of the parents' failure to have Martin examined by a doctor might be true. In his instructions the judge had told the jury that to constitute the statutory offence with which the parents were charged it was unnecessary for the Crown to prove that at the time when it was alleged the parents should have had the child seen by a doctor either they in fact knew that their failure to do so involved a risk of causing him unnecessary suffering or injury to health or they did not care whether this was so or not. Following a line of authority by appellate courts that was binding on him, the trial judge treated the offence as one of strict liability and told the jury that the test of the parents' guilt was objective only: 'Would a reasonable parent, with knowledge of the facts that were known to the accused, appreciate that failure to have the child examined was likely to cause him unnecessary suffering or injury to health?' That was the question that the jury by their verdict answered Yes, not any question as to the parents' own state of mind.

The Court of Appeal, regarding themselves as bound by the same line of authority, felt compelled to dismiss the parents' appeal, but expressed their opinion that the law on this subject was worthy of review by your Lordships' House and gave the parents leave to appeal. They certified as the point of law of general public importance involved

in their decision to dismiss the appeal:

'What is the proper direction to be given to a jury on a charge of wilful neglect of a child under s. 1 of the Children and Young Persons Act, 1933, as to what constitutes the necessary mens rea of the offence?'

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The relevant provisions of s. 1 are in the following terms:

'(1) If any person who has attained the age of sixteen years and has the custody, charge, or care of any child or young person under that age, wilfully assaults, ill-treats, neglects, abandons, or exposes him, or causes or procures him to be assaulted, ill-treated, neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering or injury to health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of a misdemeanour, and shall be liable — (a) on conviction on indictment, to a fine, or alternatively, or in addition thereto, to imprisonment for any term not exceeding two years . . .

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'(2) For the purposes of this section — (a) a parent or other person legally liable to maintain a child or young person shall be deemed to have neglected him in a manner likely to cause injury to his health if he has failed to provide adequate food, clothing, medical aid or lodging for him, or if, having been unable otherwise to provide such food, clothing, medical aid or lodging, he has failed to take steps to procure it to be provided under enactments applicable in that behalf . . .'

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A provision in the same terms as s. 1(1) has been on the statute book since the Prevention of Cruelty to, and Protection of, Children Act, 1889. It was re-enacted successively in the Prevention of Cruelty to Children Acts, 1894 and 1904, the former of which was in force when *R v Senior* (1) was decided and the latter when *R v Petch* (2) was decided. It was again re-enacted in the Children Act, 1908. A statutory offence defined in these terms has thus been in existence for more than ninety years.

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Section 1(2)(a) on the other hand has its legislative origin in s. 37 of the Poor Law Amendment Act, 1868. This made it a summary offence for a parent to

"wilfully neglect to provide adequate food, clothing, medical aid or lodging for his child . . . whereby the health of such child shall have been or shall be likely to be seriously injured".

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It was the only relevant provision that was in force when *R v Downes* (3) was decided. It was repealed by the Prevention of Cruelty to, and Protection of, Children Act, 1889, and for nineteen years, which

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- (1) 63 JP 8; [1899] 1 QB 283
- (2) (1909) 2 CR App R 71
- (3) (1875) 40 JP 438; 1 QBD 25

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covered the date when *R v Senior* (1) was decided, there was no corresponding provision on the statute book until its reappearance in its present form but without the adverb 'seriously' as a 'deeming' provision in the Children Act 1908.

The language in which the relevant provisions of the 1933 Act are drafted consists of ordinary words in common use in the English language. If I were to approach the question of their construction untrammelled (as this House is) by authority I should have little hesitation in saying that where the charge is one of wilfully neglecting to provide a child with adequate medical aid, which in appropriate cases will include precautionary medical examination, the prosecution must prove (i) that the child did in fact need medical aid at the time at which the parent is charged with having failed to provide it and (ii) either that the parent was aware at that time that the child's health might be at risk if it were not provided with medical aid or that the parent's unawareness of this fact was due to his not caring whether the child's health were at risk or not. In view of the previous authorities, however, which reach a different conclusion, it becomes necessary to analyse more closely the wording and structure of s. 1(1) and (2)(a). This I propose to do first, then to proceed to examine the authorities themselves and finally to consider what weight should be given to the subsequent re-enactment by Parliament of the selfsame provisions.

The presence of the adverb 'wilfully' qualifying all five verbs, 'assaults, ill-treats, neglects, abandons, or exposes', makes it clear that any offence under s. 1 requires mens rea, a state of mind on the part of the offender directed to the particular act or failure to act that constitutes the actus reus and warrants the description 'wilful'. The other four verbs refer to positive acts, 'neglect' refers to failure to act, and the judicial explanation of the state of mind denoted by the statutory expression 'wilfully' in relation to the doing of a positive act is not necessarily wholly apt in relation to a failure to act at all. The instant case is in the latter category, so I will confine myself to considering what is meant by wilfully neglecting a child in a manner likely to cause him unnecessary suffering or injury to health.

In construing the statutory language it is not always appropriate, and may often be misleading, to dissect a compound phrase and to treat a particular word or words as intended to be descriptive only of the mens rea of the offence and the remainder as defining only the actus reus. But s. 1 of the 1933 Act contains in sub-s (2)(a) a clear indication of a dichotomy between 'wilfully' and the compound phrase 'neglected him [sc the child] in a manner likely to cause injury to his health'. When the fact of failure to provide adequate food, clothing, medical aid or lodging has been established, the deeming provision applies only to that compound phrase; it still leaves the prosecution with the burden of proving the required mens rea, the mental element of 'wilfulness' on the part of the accused.

The actus reus of the offence with which the accused were charged in the instant case does not involve construing the verb 'neglect', for

the offence fell within the deeming provision; and the only question as respects the *actus reus* was: Did the parents fail to provide for Martin in the period before his death medical aid that was in fact adequate in view of his actual state of health at the relevant time? This, as it seems to me, is a pure question of objective fact to be determined in the light of what has become known by the date of the trial to have been the child's actual state of health at the relevant time. It does not depend on whether a reasonably careful parent, with knowledge of those facts only which such a parent might reasonably be expected to observe for himself, would have thought it prudent to have recourse to medical aid. The concept of the reasonable man as providing the standard by which the liability of real persons for their actual conduct is to be determined is a concept of civil law, particularly in relation to the tort of negligence; the obtrusion into criminal law of conformity with the notional conduct of the reasonable man as relevant to criminal liability, though not unknown (e.g. in relation to provocation sufficient to reduce murder to manslaughter), is exceptional, and should not lightly be extended: see *Andrews v Director of Public Prosecutions* (4). If failure to use the hypothetical powers of observation, ratiocination and foresight of consequences possessed by this admirable but purely notional exemplar is to constitute an ingredient of a criminal offence, it must surely form part not of the *actus reus* but of the *mens rea*.

It does not, however, seem to me that the concept of the reasonable parent, what he would observe, what he would understand from what he had observed, and what he would do about it, has any part to play in the *mens rea* of an offence in which the description of the *mens rea* is contained in the single adverb 'wilfully'. In the context of doing to a child a positive act (assault, ill-treat, abandon or expose) that is likely to have specified consequences (to cause him unnecessary suffering or injury to health), 'wilfully', which must describe the state of mind of the actual doer of the act, may be capable of bearing the narrow meaning that the wilfulness required extends only to the doing of the physical act itself which in fact results in the consequences described, even though the doer thought that it would not and would not have acted as he did had he foreseen a risk that those consequences might follow. Although this is a possible meaning of 'wilfully', it is not the natural meaning even in relation to positive acts defined by reference to the consequences to which they are likely to give rise; and, in the context of the section, if this is all the adverb 'wilfully' meant, it would be otiose. Section 1(1) would have the same effect if it were omitted; for even in absolute offences (unless vicarious liability is involved) the physical act relied on as constituting the offence must be wilful in the limited sense, for which the synonym in the field of criminal liability that has now become the common term of legal art is 'voluntary'.

So much for 'wilfully' in the context of a positive act. To 'neglect' a child is to omit to act, to fail to provide adequately for its needs, and, in the context of s. 1 of the 1933 Act, its physical needs rather than

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its spiritual, educational, moral or emotional needs. These are dealt with by other legislation. For reasons already given the use of the verb 'neglect' cannot, in my view, of itself import into the criminal law the civil law concept of negligence. The actus reus in a case of wilful neglect is simply a failure, for whatever reason, to provide the child whenever it in fact needs medical aid with the medical aid it needs. Such a failure as it seems to me could not be properly described as 'wilful' unless the parent either (i) had directed his mind to the question whether there was some risk (though it might fall far short of a probability) that the child's health might suffer unless he were examined by a doctor and provided with such curative treatment as the examination might reveal as necessary, and had made a conscious decision, for whatever reason, to refrain from arranging for such medical examination, or (ii) had so refrained because he did not care whether the child might be in need of medical treatment or not.

As regards the second state of mind, this imports the concept of recklessness which is a common concept in mens rea in criminal law. It is not to be confused with negligence in the civil law of tort (see *Andrews v Director of Public Prosecutions* (4)). In speaking of the first state of mind I have referred to the parent's knowledge of the existence of some risk of injury to health rather than of a probability. The section speaks of an act or omission that is 'likely' to cause unnecessary suffering or injury to health. This word is imprecise. It is capable of covering a whole range of possibilities from 'it's on the cards' to 'it's more probable than not', but, having regard to the ordinary parent's lack of skill in diagnosis and to the very serious consequences which may result from failure to provide a child with timely medical attention, it should in my view be understood as excluding only what would fairly be described as highly unlikely.

I turn now to the authorities. I do not find the first of them, *R v Downes* (3), very helpful. The charge was one of manslaughter and involved the religious beliefs of the sect known as 'the Peculiar People' who believed that all resort to medical as opposed to spiritual aid in illness was sinful. The statute referred to was s. 37 of the Poor Law Amendment Act, 1868, which has long been repealed. I pause on this case only to observe that it was decided at a period when judicial opinion was less hesitant than it has since become to accept that Parliament intended to create absolute offences which required no mens rea on the part of the accused.

To the judgment of Lord Russell, C.J., in *R v Senior* (1) may be ascribed the origin of the construction of s. 1(1) of the Children and Young Persons Act, 1933, that has since been followed. This case also was one of failure by a member of the sect of Peculiar People to provide medical attention for his infant child. In considering this judgment it is important to remember (i) that the section of the 1894 Act that Lord Russell, C.J., was construing did not contain the deeming provisions that are to be found in s. 1(2)(a) of the 1933 Act and (ii) that the parent knew that the child's physical suffering might be

(1) 63 JP 8; [1899] 1 QB 283

(3) (1875) 40 JP 438; 1 QBD 25

(4) 101 JP 386; [1937] 2 All ER 552; [1937] AC 576

alleviated by medical treatment but had deliberately refrained from having recourse to it because he thought to do so would be sinful as showing unwillingness to accept God's will in relation to the child.

So here there was not any question of the accused parent being unaware that risk to the child's health might be involved in his failure to provide it with medical aid. He deliberately refrained from having recourse to medical aid with his eyes open to the possible consequences to the child's physical health. He broke the law because he sincerely believed that to comply with its command would be sinful and would be against the interests of the child's spiritual welfare. In an extempore judgment directed only to a deliberate breach of the law on conscientious grounds, it is not surprising that Lord Russell felt able to deal with the construction of the statute shortly. He said:

"Wilfully" means that the act is done deliberately and intentionally, not by accident or inadvertence, but so that the mind of the person who does the act goes with it. Neglect is the want of reasonable care — that is, the omission of such steps as a reasonable parent would take, such as are usually taken in the ordinary experience of mankind ...'

My Lords, there was at that time no specific reference in the statute to the provision of adequate food, clothing, medical aid or lodging. The word 'neglects' was quite general, qualified only by the requirement that it must be in such a manner as to be likely to cause the child unnecessary suffering or injury to health. One cannot quarrel with Lord Russell's statement that 'neglect is want of reasonable care' if all that that means is that a reasonable parent who was mindful of the physical welfare of his child and possessed of knowledge of all the relevant facts would have taken steps that the accused omitted to take to avoid the risk of unnecessary suffering by the child or injury to his health. The danger of the statement is that it invites confusion between, on the one hand, neglect and, on the other hand, negligence, which calls for consideration not of what steps should have been taken for that purpose in the light of the facts as they actually were but of what steps would have been appropriate in the light of those facts only which the accused parent either knew at the time of his omission to take them or would have ascertained if he had been as mindful of the welfare of his child as a reasonable parent would have been.

Lord Russell's brief explanation of the meaning of 'wilfully' is confined to positive physical acts. In relation to these he equates wilful acts with acts that would now be described as 'voluntary'. I do not myself think that this was right even in relation to positive physical acts of which the statutory definition included the characteristic that they were likely to have certain consequences; but its meaning in relation to positive acts is clear. I find its meaning obscure, however, in relation to a failure to do a physical act where the failure is not deliberate or intentional in the sense that consideration has been given whether or not to do it and a conscious choice made not to do it. To speak of the mind going with the act is inappropriate to omissions, but the contrast drawn between 'deliberately and intentionally' and 'by inadvertence' is at least susceptible of the meaning that if the

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accused has not addressed his mind to the question whether or not to do the physical act he is accused of omitting to do, his failure to do the act is not to be treated as 'wilful'.

R v Senior (1), however, appears to have been treated as having decided that if the child did in fact need medical treatment it did not matter whether the accused parent actually knew or ought to have known that medical treatment was needed; he was none the less guilty of the offence of wilfully neglecting the child if all that he knew was that the child had not been seen by a doctor. This appears from the judgment of the Court of Appeal in *R v Lowe* (5). So *R v Senior* (1) has been regarded as deciding that the offence under s. 1(1) of the 1933 Act is an absolute offence.

My Lords, I have already said why I do not think that *R v Senior* did so decide, even in respect of the offence created by the 1894 Act which did not contain the deeming provisions that were included for the first time in the 1908 Act. Senior did know that some risk to the child's physical health was involved in refraining from allowing his child to have medical treatment and he deliberately decided to take it. It is true that in *R v Petch* (2), a prosecution under the 1904 Act, briefly reported in 2 Cr. App. R. 71, where the jury had brought in a verdict that the accused was 'guilty' of wilful neglect through ignorance it was held that the words 'through ignorance' did not negative the wilfulness required by the section, but no reason for this holding was given by the court.

So, up to the passing of the 1908 Act, I find nothing in the nature of a clear judicial interpretation of the words 'wilfully neglects' in what then became part of s. 12 of that Act and later became s. 1(1) of the 1933 Act which would justify the application of the principle laid down by this House in *Barras v Aberdeen Steam Trawling and Fishing Co Ltd* (6) that where words used in a statute have received a clear judicial interpretation they are presumed to bear the same meaning when used in the same context in a subsequent Act unless a contrary meaning is indicated. Furthermore, while the immediate context was the same in the 1908 and 1933 Acts as it had been in the 1894 and 1904 Acts, the addition of the deeming provisions in the later Acts, in my view and for reasons that I have already stated, casts a light on the parliamentary intention at that time which shows it to have been inconsistent with what in subsequent cases has been treated as having been held in *R v Senior* to be the meaning of 'wilfully neglects'.

So what your Lordships are faced with is a consistent practice of the courts, extending over many years without any reported exceptions, of treating *R v Senior* (1) as if it were a binding authority for the proposition that the statutory offence of wilfully neglecting a child by failing to provide him with adequate medical aid is an absolute offence.

In many fields of law I should hesitate long before recommending this House to overturn a long-standing judicial acceptance of a par-

(1) 63 JP 8; [1899] 1 QB 283

(2) (1909) 2 CR App R 71

(5) 137 JP 334; [1973] 1 All ER 805

(6) [1933] AC 402

ticular meaning for a statutory provision. Communis error facit lex is often a good maxim in promoting legal certainty in matters in which people arrange their affairs in reliance on the accepted meaning of a law. But three reasons persuade me not to apply the maxim in the instant case. The climate of both parliamentary and judicial opinion has been growing less favourable to the recognition of absolute offences over the last few decades, a trend to which s. 1 of the Homicide Act, 1957, and s. 8 of the Criminal Justice Act, 1967, bear witness in the case of Parliament, and in the case of judiciary is illustrated by the speeches in this house in *Sweet v Parsley* (8). Secondly, the Court of Appeal in the instant case has expressed its own feeling of unease about the present state of the authorities by which it regards itself as bound and has granted leave to appeal in order that those authorities may be reviewed by your Lordship's House. Thirdly, and most importantly, the common error, as I believe it to have been, has operated to the disadvantage of the accused and to correct it will spare from criminal conviction those only who are free from any moral guilt.

To give to s. 1(1) of the 1933 Act the meaning which I suggest it bears would not encourage parents to neglect their children nor would it reduce the deterrent to child neglect provided by the section. It would afford no defence to parents who do not bother to observe their children's health or, having done so, do not care whether their children are receiving the medical examination and treatment that they need or not; it would involve the acquittal of those parents only who through ignorance or lack of intelligence are genuinely unaware that their child's health may be at risk if it is not examined by a doctor to see if it needs medical treatment. And, in view of the abhorrence which magistrates and juries feel for cruelty to helpless children, I have every confidence that they would not readily be hoodwinked by false claims by parents that it did not occur to them that an evidently sick child might need medical care.

In the instant case it seems likely that on the evidence the jury, if given the direction which I have suggested as correct, would have convicted one or both of the accused; but I do not think it possible to say with certainty that they would. It follows that in my opinion these appeals must be allowed and that the certified question should be answered:

'The proper direction to be given to a jury on a charge of wilful neglect of a child under s. 1 of the Children and Young Persons Act, 1933, by failing to provide adequate medical aid is that the jury must be satisfied (i) that the child did in fact need medical aid at the time at which the parent is charged with failing to provide it (the *actus reus*) and (ii) either that the parent was aware at that time that the child's health might be at risk if it was not provided with medical aid or that the parent's unawareness of this fact was due to his not caring whether his child's health was at risk or not (the *mens rea*).'

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LORD EDMUND-DAVIES. In November, 1979, the appellants were convicted in the Crown Court at Northampton of cruelty to their son Martin between 1st July, 1978, and 29th January, 1979, contrary to s. 1(1) of the Children and Young Persons Act, 1933. By leave of the single judge, they appealed to the Court of Appeal, Criminal Division, which dismissed their appeals, and, in granting them leave to come to this House, certified the following to be a point of law of general importance:

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'What is the proper direction to be given to a jury on a charge of wilful neglect of a child under s. 1 of the Children and Young Persons Act, 1933, as to what constitutes the necessary mens rea of the offence?'

These are the relevant parts of s. 1:

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'(1) If any person who has attained the age of sixteen years and has the custody, charge, or care of any child or young person under that age, wilfully assaults, ill-treats, neglects, abandons, or exposes him . . . in a manner likely to cause him unnecessary suffering or injury to health . . . that person shall be guilty of a misdemeanour . . .

'(2) For the purposes of this section — (a) a parent or other person legally liable to maintain a child or young person shall be deemed to have neglected him in a manner likely to cause injury to his health if he has failed to provide adequate food, clothing, medical aid or lodgings for him . . .'

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Martin Sheppard, who died at the age of sixteen months on 28th January, 1979, of hypothermia associated with malnutrition, was the youngest of the appellants' three children. He had seemingly taken no solid food for about five days before death and no milk for two days, and the complete absence of subcutaneous fat indicated that he had lacked sufficient food for a substantial period. For several days before his death he had suffered from gastro-enteritis and this had rendered him incapable of ingesting nourishment. The home was poor and the main room lacked a power point. And the appellants had failed to keep three appointments made by the health visitor over a period of months for Martin to see a paediatrician.

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The evidence fully entitled the jury to find that the child might well have been saved had he timely received proper medical attention, and that the manifest symptoms of illness had been such that reasonable parents would have concluded that failure to secure medical aid for the child might well result in 'unnecessary suffering or injury to health'. But the appellants seemed to be of low intelligence, and in summary form their case was (i) that while they appreciated that Martin's physical development had been slow, this did not alarm them as so also had been his father's, (ii) that, although they were aware that he had lately been vomiting back his food, they thought that this was due to no more than a passing upset which would soon disappear of itself, and (iii) that they had accordingly not realised that he needed a doctor's attention.

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Directing the jury, the learned judge said:

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"In addressing you [defence counsel] put forward this proposition. He said that if the defendants, either of them, do not know any better, how can they be guilty of neglect? If they do not know they are neglecting the child, how can they be guilty of neglect? I hope it is quite clear on what I have told you that in my judgment that is not the law . . . You ask yourself what a reasonable parent would have done in the circumstances. Would he or she have behaved in this way? Did the defendants or either of them fail to do that, for whatever reasons? If they did, it is objectively neglect by that parent, and the question remains: Is it wilful? As I say, so far as "wilful" is concerned, there is no requirement that the parent who deliberately neglects should be found to have foreseen the consequences . . . The question is: Is it deliberate?"

The learned judge doubtless based his direction on the well-known decision of the Court for Crown Cases Reserved in *R v Senior* (1). There the accused, charged with the manslaughter of his son, belonged to a sect who objected on religious grounds to calling in the medical aid which would have prolonged (and probably saved) the child's life. The accused's failure in that respect was alleged to constitute a breach of s. 1 of the Prevention of Cruelty to Children Act, 1894, the material parts of which were basically similar to those of s. 1(1) of the 1933 Act. The decision has ever since been cited on numerous occasions as authority for the proposition that, on charges of cruelty to children, it is sufficient for the prosecution to establish that the child had in fact been neglected in a manner likely to cause him unnecessary suffering or injury to health, and that the state of mind of the parent or other custodian of the child is irrelevant. So to hold is to ignore the adverb 'wilfully' qualifying the allegation of neglect, and to make the charge one of absolute liability. But whether *R v Senior* (1) decided anything of the sort is, in my judgment, questionable, for Wills, J., whose direction was upheld on appeal, had told the jury:

'there could be no doubt that the prisoner had wilfully and deliberately abstained from calling in medical assistance, though he and those about the child were aware for some considerable period before its death that it was in a state of great danger, and that therefore the question was narrowed down to whether his failure to procure medical aid could be "called neglecting the child so as to cause serious injury to its health."'" (Emphasis mine.)

In the light of the accused's established knowledge of the precarious state of his child's health, the jury could have been in no doubt that he foresaw the probable consequences of failure to summon medical aid. The element of wilfulness was accordingly clear, and it is against that background that one should read the extempore holding of Lord Russell, C.J., that "wilfully" means that the act is done deliberately

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and intentionally, not by accident or inadvertence, but so that the mind of the person who does the act goes with it'.

Be that as it may, *R v Senior* (1) was the starting point of a long series of cases culminating in the Court of Appeal, Criminal Division, judgment in *R v Lowe* (5) that, in the words of Phillimore, LJ:

'It did not matter what [the father of the deceased child] ought to have realised as the possible consequences of his failure to call a doctor — the sole question was whether his failure to do so was deliberate and thereby occasioned the results referred to in [s. 1 of the 1933 Act].'

By attaching no importance to the mental ingredient of wilfulness, *R v Lowe* (5) and all similar decisions must, in my respectful judgment, be regarded as wrongly decided. 'Neglect' is doubtless a state of fact to be objectively determined, and in the circumstances of the present case it was 'deemed' by s. 1(2)(a) to be established by the unchallenged fact that in truth the accused had 'failed to provide adequate medical aid' for their son. But there was no 'deeming' provision in the Prevention of Cruelty to Children Act, 1893, which was under consideration in *R v Senior* (1). It made its debut in s. 12(1) of the Children Act, 1908. Worthy of note is the fact that there is no statutory 'deeming' about the wilfulness of the neglect. Yet the essence of the prosecutors' case against these appellants was that their wilfulness followed automatically from their undoubtedly failure to summon medical aid. In the result, on the authority of a line of cases beginning with *R v Senior* (1) (which related to a statute containing no 'deeming' provision), it is said that at common law wilfulness is itself to be deemed whenever neglect has been established, whether by 'deeming' or otherwise. That surely cannot be right.

But this consolidated appeal raised an issue more important than the significance of the limited operation of the 'deeming' provision in s. 1(2)(a) of the 1933 Act. Yet again it involves consideration of the acceptability in social terms of imposing strict liability in charges laid under that section. Recognition that the necessity of establishing mens rea may (in some types of cases) be properly dispensed with does not lessen the cogency of the oft-ignored warning of Brett, M.R., in *Attorney General v Bradlaugh* (7) that

'it is contrary to the whole established law of England (unless the legislation on the subject has clearly enacted it), to say that a person can be guilty of a crime in England without a wrongful intent — without an attempt to do that which the law has forbidden.'

It has sadly to be said that the law reports are scattered with illustrations of departures from that salutary approach. But the tide has at last,

(1) 63 JP 8; [1899] 1 QB 283

(5) 137 JP 334; [1973] 1 All ER 805

(7) (1885) 49 JP 500; 14 QBD 667

fortunately turned, a fact amply recognised by your Lordships' House in *Sweet v Parsley* (8) where Lord Reid said:

'Our first duty is to consider the words of the Act; if they show a clear intention to create an absolute offence, that is an end of the matter. But such cases are very rare. Sometimes the words of the section which creates a particular offence make it clear that mens rea is required in one form or another. Such cases are quite frequent. But in a very large number of cases there is no clear indication either way. In such cases there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that, whenever a section is silent as to mens rea, there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require mens rea.'

It is not, I think, open to doubt that s. 1 of the 1933 Act falls into the third of the categories dealt with by Lord Reid, and, that being so, 'the mere fact that Parliament has made the conduct a criminal offence gives rise to *some* implication about the mental element of the conduct proscribed', see per Lord Reid in *Sweet v Parsley* (8). So regard must always be had to the state of mind of persons charged with wilful neglect. As to this, s. 8 of the Criminal Justice Act, 1967, requires that the state of mind is to be ascertained by a subjective investigation into the mind of the person charged, an investigation taking into account all the established facts of the case. And its aim is to enable the magistrate or jury to answer the question: What in fact did the defendant think the position was regarding his child's health at the relevant time, that is, if he gave the matter any thought at all?

The justice (and, with respect, the common sense) of the matter is surely that, as Professor Glanville Williams has put it in his *Textbook of Criminal Law* (1978, p. 88):

'We do not run to a doctor whenever a child is a little unwell. We invoke medical aid only when we think that a doctor is reasonably necessary and may do some good. The requirement of wilfulness means, or should mean, that a parent who omits to call in the doctor to his child is not guilty of the offence if he does not know that the child needs his assistance.'

But to that must be added that a parent reckless about the state of his child's health, not caring whether or not he is at risk, cannot be heard to say that he never gave the matter a thought and was therefore not wilful in not calling in a doctor. In such circumstances recklessness constitutes mens rea no less than positive awareness of the risk involved in failure to act.

My Lords, the supremacy of this House in its unprecedented task of interpreting s. 1 of the 1933 Act should not be regarded as fettered by its legislative ancestry or its judicial history in subordinate courts,

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as to which the Court of Appeal, Criminal Division, in the present case obviously felt some disquiet. That is understandable, for the extensive interpretation hitherto accepted involves rejection of the presumption in favour of a strict construction of criminal statutes which grew up in the eighteenth century and has persisted to this day. That interpretation has again found favour, this time with some of your Lordships, but I respectfully find it unacceptable. And, notwithstanding its conformity to that given in countless cases over the last eighty years, the direction to the jury in the present case cannot, in my judgment, be upheld. Nor do I consider that to depart from it would lessen the law's protection of the welfare of children. For my part, I have confidence in the vigilance and ability of magistrates and juries to detect cases of wilful neglect. The stronger the objective indications of neglect, the more difficult for defendants to repel the conclusion that they must have known of the plight of the children in their charge, or, at least, that they had been recklessly regardless of their welfare. And, as my noble and learned friend Lord Keith, has said, feckless parents who fall into neither of those categories are not (and, in the nature of things, cannot be) deterred by the law as hitherto understood from neglecting their children. To perpetuate the prevailing approach cannot therefore be said to be either in the children's interest or in accordance with justice to those having children in their charge.

What verdicts the jury would have returned had they been directed substantially in the terms indicated in the speech of my noble and learned friend Lord Diplock (which I respectfully adopt) must remain a matter of conjecture. In sentencing the accused the trial judge said that it was 'a bad case of child neglect'. But he added that the evidence did not show that the parents had been persistently and deliberately cruel, that neither of them had foreseen the child's death, and that 'you simply failed during the last month to obtain the necessary and available medical assistance'.

In my judgment, the possibility that a miscarriage of justice had occurred cannot be eliminated, and I would therefore allow this consolidated appeal.

LORD FRASER OF TULLYBELTON: The appellants were convicted of having wilfully neglected their child, Martin, in a manner likely to cause unnecessary suffering to the child, or injury to its health, contrary to the Children and Young Persons Act, 1933, s. 1, as amended. Martin died on 29th January, 1979, aged 16 months and a post-mortem examination showed that he had not retained any solid food for five days or any liquid for about two days immediately before he died. The defence was that the appellants had not appreciated that there was anything seriously the matter with him or that he required treatment by a doctor during the last two or three months of his life, and particularly during the last week of his life.

An offence under s. 1(1) is committed by a parent who 'wilfully assaults, ill-treats, neglects, abandons, or exposes' a child in his care in 'a manner likely to cause him unnecessary suffering or injury to health.' By subs-s (2)(a) a parent is deemed to have neglected a child in such a manner 'if he has failed to provide adequate food, clothing, medical

care or lodging for him.' In the present case it is clear that the accused failed to provide adequate, or any, medical care for Martin during the last weeks of his life and there is therefore no doubt that they did neglect him. The question is whether they did so wilfully or not. The word 'wilfully' in this context is ambiguous. It may mean that the parent neglects his child intending, or at least foreseeing, that the probable consequence of neglect is that the child will suffer injury to his health. Or it may have the more restricted meaning that the parents' neglect was conduct which was deliberate, in the sense of being conscious and free from outside pressure, without necessarily intending or foreseeing the consequences. If I had to approach the question afresh without reference to authority or to the history of the legislation, my inclination would be to prefer the former, and wider, meaning of the expression. Even so I would regard the answer as doubtful. In fact authority is not lacking and the learned judge evidently had regard to it, as he was bound to do in directing the jury. He directed them that 'neglect' was not a state of mind but was conduct, and that it was to be judged by the objective standard of what a reasonable parent would have done in the circumstances (as known to the appellants at the time). The words in brackets are my own, but I think they are implied in what the judge said. He directed them further that neglect was 'wilful' if it was 'deliberate', and said:

'There is no requirement that the parent who deliberately neglects should be found to have foreseen the consequences.'

I do not think it would be right to consider the effect of the words 'wilfully neglect' in the 1933 Act without having regard to authority and to the way the legislation on this matter was developed. It is convenient to begin with *R v Wagstaffe* (9) where parents were prosecuted for manslaughter of their child by neglecting to provide proper medical attention for it. The accused belonged to the 'Peculiar People' sect, who believed that medical aid for the sick was unnecessary because they believed in the healing power of God. Their faith was based on a text of the General Epistle of James as follows (5: 14-15):

'Is any sick among you? let him call for the elders of the church; and let them pray over him, anointing him with oil in the name of the Lord: and the prayer of faith shall save the sick, and the Lord shall raise him up.'

Willes, J., directed the jury that, if the parents had acted in what they honestly believed was the child's best interest, they should be acquitted. The accused were acquitted.

Just six months after that case the Poor Law Amendment Act, 1868, was passed, in July, 1868, and by s. 37 it created an offence

'when any parent shall wilfully neglect to provide adequate food, clothing, medical aid, or lodging for his child . . . whereby the health of such child shall have been or shall be likely to be seriously injured.'

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There seems little doubt, as Lord Russell, C.J., said in *R v Senior* (1), that that section was passed because the legislature was of opinion that circumstances such as had existed in *R v Wagstaffe* (9) were not adequately provided for by the existing law. The purpose of s. 37 evidently was, in my opinion, to provide that an honest but mistaken belief that medical aid was unnecessary would not be a defence, and thus in effect to reverse the direction given by Willes J in *R v Wagstaffe* (9). That is how the provision was construed in *R v Downes* (3) where the accused was another of the Peculiar People. He was held to have been rightly convicted of manslaughter notwithstanding an express finding by the jury that he bona fide, though erroneously, believed that medical advice was not required for the child. Lord Coleridge, C.J., said that, had it not been for s. 37 of the 1868 Act, he would have entertained 'great doubt' on the case for the reasons stated by Willes, J., in *R v Wagstaffe*. Referring to s. 37 he said:

'By wilfully neglecting, I understand an intentional and deliberate abstaining from providing the medical aid, knowing it to be obtainable.'

He said that motives of the accused were irrelevant, and that if he had been proceeded against summarily under the statute he would clearly have been liable. His neglect was therefore culpable and to cause death by culpable neglect was manslaughter.

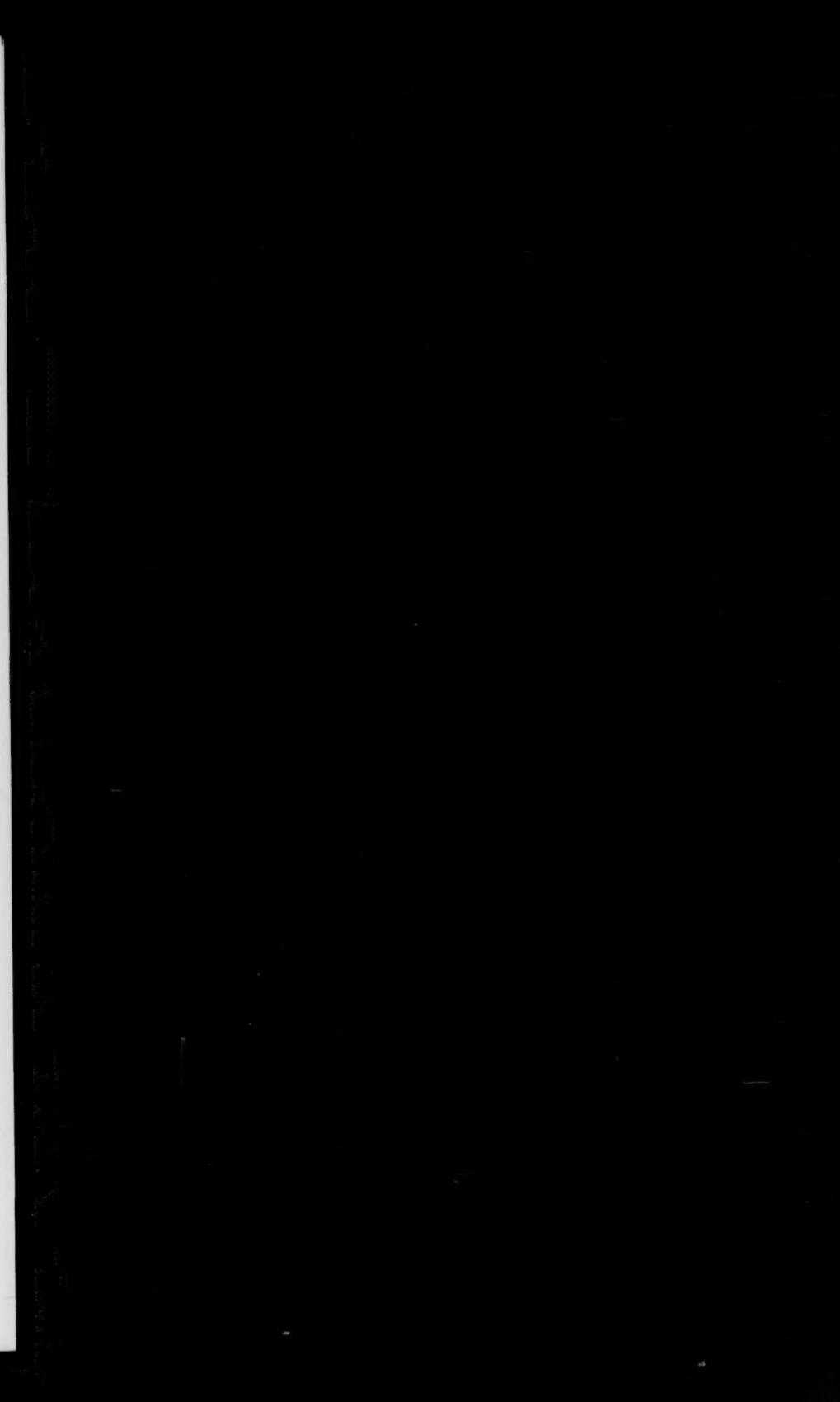
The Prevention of Cruelty to, and Protection of, Children Act, 1889, repealed s. 37 of the 1868 Act and replaced it with a provision (in s. 1) that any person who wilfully 'ill-treats, neglects, abandons, or exposes such child . . . in a manner likely etc' will be guilty of an offence. That provision was repealed and substantially re-enacted by the Prevention of Cruelty to Children Act, 1894, s. 1, which, apart from inserting 'assaults' immediately after 'wilfully', made no other material alteration in the provision.

Under the 1894 Act there occurred the case which has generally been regarded as the most important authority on this point, *R v Senior* (1), where again the accused was one of the Peculiar People. He was convicted of manslaughter and the conviction was upheld on appeal. The judge, Wills, J., directed the jury that they must be satisfied, first, that the death of the child had been caused or accelerated by the want of medical assistance, and, secondly, that medical aid and medicine were such essential things for the child that *reasonably careful parents* in general would have provided them (my emphasis). He then directed them that the accused could not be convicted of manslaughter at common law because he had been a kind and affectionate parent in all respects except the failure to provide medical aid, but that, if he had done anything which was expressly forbidden by the 1894 Act, and had thereby caused the child's death, he would be guilty 'no matter what his motive or state of mind'. The accused

(1) 63 JP 8; [1899] 1 QB 283

(3) (1875) 40 JP 438; 1 QBD 25

(9) (1868) 32 JP 215





was well aware that the child was in a state of great danger, but the prosecution conceded that he was acting bona fide and according to his conception of duty. The evidence was that the accused believed the use of medical aid to be wrong because 'to make use of it is to indicate a want of faith in the Lord'. The report does not state whether he believed that medical aid was unnecessary for the physical needs of the child, but, having regard to his faith in the efficacy of prayer which is entirely consistent with a literal reading of the text in the Epistle of James, and also to findings in *R v Downes* (3), I think he must have believed that medical aid was both wrong and unnecessary. Accordingly, *R v Senior* is not, in my opinion, a case where the accused foresaw the probable consequences of his neglect. Lord Russell, C.J., said:

"Wilfully" means that the act is done deliberately and intentionally, not by accident or inadvertence, but so that the mind of the person who does the act goes with it. Neglect is the want of reasonable care — that is, the omission of such steps as a reasonable parent would take, such as are usually taken in the ordinary experience of mankind — that is, in such a case as the present, provided the parent had such means as would enable him to take the necessary steps.'

The next significant stage in the history comes with the Children Act, 1908, which repealed earlier legislation and re-enacted the provision against neglecting a child in a manner likely to cause unnecessary suffering or injury to health etc, and added a deeming proviso in terms substantially identical with those of s. 1(2)(a) of the 1933 Act. Since 1908 there has been no change in the legislation which is relevant for present purposes. The effect of the deeming proviso introduced in 1908 is, in my opinion, merely to provide that failure to provide adequate food, medical aid etc shall constitute neglect contrary to the Act, and to leave the meaning of the word 'wilfully' unaffected. As to what is meant by 'adequate' medical aid in sub-s (2)(a), one asks: 'adequate for what?' It cannot mean adequate to prevent the likelihood of injury to the child's health, or adequate in the light of what is known at the date of the trial to have prevented injury to health, because in some cases no amount of medical aid would prevent injury to health, which is defined in sub-s (1) as

'including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement'.

To read 'adequate' in such an absolute sense would mean that every parent whose child died would be guilty of neglect, though not necessarily of wilful neglect. That cannot be right. Neglect must convey some implication of omission to perform a duty. In a case where in spite of the best medical aid the child suffered injury to health, or death, it would surely be an abuse of language to say that the parent had behaved with (non-wilful) neglect. Moreover, it would throw an unduly heavy

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burden on the word 'wilfully' in the context. In my opinion 'adequate' medical aid (or food or lodging) means such as ordinary reasonably careful parents would have provided in the circumstances as known to the accused. That agrees with the explanation of the word in the 1894 Act given by Lord Russell, C.J., in *R v Senior* (1), and I see nothing in subsequent legislation to change the meaning of 'wilfully' or 'neglect' there explained. Quite the contrary. If Parliament had wished to alter or correct those meanings, that could easily have been done in the 1933 Act, but it was not.

Lord Russell CJ's explanation had been followed in many cases since *R v Senior* (1). For example, in *R v Petch* (2), where a child had died of malnutrition, the parents were convicted of 'wilful neglect through ignorance', and that was held to be a good verdict of guilty. In *R v Walker* (10) Avory, J., adopted the explanation from *R v Senior* (1). In the Scottish case of *Clark v HM Advocate* (11) the Lord Justice-Clerk (Grant) quoted Lord Russell C.J.'s, explanation of 'wilfully' with approval, and treated a defence that the consequences of the failure to provide medical aid were not intended or foreseen (emphasis mine) as irrelevant. In *R v Lowe* (5) Phillimore, L.J., delivering the judgment of the Court of Appeal, Criminal Division, consisting of himself, Cusack, J., and Mars-Jones, J., summarised with approval the argument for the Crown thus:

'It did not matter what [the accused] ought to have realised as the possible consequences of his failure to call a doctor — the sole question was whether his failure to do so was deliberate and thereby occasioned the results referred to in the section.'

In view of the long period for which the explanation in *R. v Senior* (1) has been accepted and the large number of cases in which it has been applied, apparently with approval, by many learned judges, I would be very hesitant about overruling it now even if I thought it wrong. But I do not. The provisions of what is now s. 1 of the 1933 Act are intended by Parliament for the protection of children who are unable to look after themselves and are in the care of older people. There is nothing unreasonable in their being stringent and objective. If the offence required proof that the particular parents were aware of the probable consequences of neglect, then the difficulty of proof against stupid or feckless parents would certainly be increased and so I fear might the danger to their children. Such parents would not necessarily be unaffected by the existence of an absolute offence; they might not be able to appreciate when their child needed medical care whenever the child showed any signs of ill-health, even though the signs might seem to them to be trivial. I recognise that the climate of opinion has recently become less favourable than it once was to the recognition of absolute offences, but I do not think that such change of climate as has taken place justifies us in departing from a con-

(1) 63 JP 8; [1899] 1 QB 283

(2) (1909) 2 CR App R 71

(5) 137 JP 334; [1973] 1 All ER 805

(10) (1934) 24 Cr App R 117

(11) 1863 JC 53

struction of this provision which has been consistently followed by the courts since 1899, and which is, at the very least, not manifestly wrong. Especially in these times when parental responsibility for children tends to be taken all too lightly, such a sharp change towards relaxation of the law on the subject seems to me appropriate only for the legislature and not for the courts.

In these circumstances I regret that I am unable to agree with the direction which has commended itself to the majority of my noble and learned friends as being appropriate for this type of case. I would dismiss the appeal.

LORD KEITH OF KINKEL: Neglect of a child means, according to the ordinary use of language, a failure to bestow proper care and attention on the child. In my opinion that is what the word means in s. 1(1) of the Children and Young Persons Act, 1933, where, however, the reference to unnecessary suffering or injury to health shows that its ambit is limited to the physical needs of the child and does not cover other aspects such as the moral and educational. Parents no doubt take widely varying views about what constitutes proper care and attention for their children. It is not possible to set any absolute standard, though it might not be difficult to recognise a certain minimum below which no reasonably conscientious parent would fall. By s. 1(2)(a), however, it is deemed to constitute neglect of a child in the relevant manner that the parent 'has failed to provide adequate food, clothing, medical care or lodging for him'. In my opinion this deeming provision sets certain objective standards which certainly cover the largest part of the field of neglect. It is unnecessary to consider how much further the field may extend. The test stated, in relation to each type of provision mentioned, is that of adequacy, a word which itself conveys the idea of a minimum standard. It is necessarily to be implied that the child had need of the provision in question.

This appeal is concerned solely with a failure to provide adequate medical care. The word 'adequate', as applied to medical care, may mean no more than 'ordinarily competent'. If it is related to anything, I think it is related to the prevention of unnecessary suffering or injury to health, as mentioned in s. 1(1), where in my view the adjective 'unnecessary' qualifies both 'suffering' and 'injury to health'. There could be no question of a finding of neglect against a parent who provided ordinarily competent medical care, but whose child nevertheless suffered further injury to its health, for example, paralysis in a case of poliomyelitis, because the injury to health would not in the circumstances have been unnecessary in the sense that it could have been prevented through the provision by the parent of adequate medical care. Failure to provide adequate medical care may be deliberate, as when the child's need for it is perceived yet nothing is done; negligent, as when the need ought reasonably to have been perceived but was not; or entirely blameless, as when the need was not perceived but was not such as ought to have been perceived by an ordinary reasonable parent. I would say that in all three cases the parent has neglected the child in the sense of the statute, since I am of opinion that in a proper construction of s. 1(2)(a) it is to be ascertained objectively and in the

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light of events whether the parent failed to provide ordinarily competent medical care which as a matter of fact the child needed in order to prevent unnecessary suffering or injury to its health.

I turn now to consider the meaning of the adverb 'wilfully' which governs and qualifies 'neglects' and all the other verbs in s. 1(1). This is a word which ordinarily carries a pejorative sense. It is used here to describe the mental element, which, in addition to the fact of neglect, must be proved in order to establish an offence under the subsection. The primary meaning of 'wilful' is deliberate'. So a parent who knows that his child needs medical care and deliberately, that is by conscious decision, refrains from calling a doctor, is guilty under the subsection. As a matter of general principle, recklessness is to be equated with deliberation. A parent who fails to provide medical care which his child needs because he does not care whether it is needed or not is reckless of his child's welfare. He too is guilty of an offence. But a parent who has genuinely failed to appreciate that his child needs medical care, through personal inadequacy or stupidity or both, is not guilty.

A study of the nineteenth century decisions under the statutory predecessors of s. 1 of the 1933 Act, of which the most important is *R v Senior* (1), shows that none of them was concerned with the situation where a parent was genuinely unaware that his child needed medical care. They were concerned with quite a different problem, namely, that of a parent who had failed to provide medical care because, under the influence of a religious belief which most people would regard as quite unreasonable, he believed that it was sinful to do so. In *R v Senior* (1) it is clear that the accused, under the influence of this belief, had wilfully shut his eyes to the need for medical care. In the circumstances it was natural to take the view that the motive for failing to provide it merely emphasised the deliberate nature of the failure. It is true that in *R v Downes* (3) the jury found that the accused, a member of the sect who held the religious belief I have mentioned, bona fide though erroneously believed that medical aid was not required for the child. But none of the judgments in the case adverted to that aspect. Lord Coleridge, C.J., said (at 30):

'By wilfully neglecting, I understand an intentional and deliberate abstaining from providing the medical aid, knowing it to be obtainable.'

I have difficulty in understanding how the abstention could be intentional and deliberate if the accused did not appreciate that medical aid was needed. It seems clear that the court proceeded wholly on the irrelevance of the accused's motive for not providing medical aid. None of these cases shows any trace of an attempt to face up to the proper application of the law to the situation where no question of motive is in issue, but where the accused's failure to provide medical care is due to inability, through stupidity or ignorance, to appreciate the

(1) 63 JP 8; [1899] 1 QB 283

(3) (1875) 40 JP 438; 1 QBD 25

need for it. So in my opinion it is an error to treat anything decided or said in these cases as authoritative in that situation. I consider that the Court of Appeal fell into that error in *R v Lowe* (5).

It is suggested that, by holding the offence created by s. 1(1) of the 1933 Act not to be an absolute one but as requiring proof of the type of mens rea which I have described, the degree of protection against neglect which is thereby afforded to children would be unacceptably diminished. In my opinion there is no substance in that consideration. If a parent genuinely does not appreciate that his child has need of medical care, then the existence of an absolute offence could have no effect on his conduct, and it would not accord with ordinary concepts of justice to hold him blameworthy. I am confident that juries and summary courts can be trusted to scrutinise most carefully the genuineness of a claim by an accused parent that he or she did not realise that their child's condition was such as to require medical care.

I agree that the question certified by the Court of Appeal, Criminal Division, should be answered as proposed by my noble and learned friend Lord Diplock, and that the appeal should be allowed.

LORD SCARMAN: Agreeing as I do with the speech delivered by my noble and learned friend Lord Fraser, I burden your Lordships with a speech only because the question in the appeal is of considerable social importance.

The conduct charged against the two appellants was, as the trial judge put it to the jury, that 'the parents failed, each of them, to provide adequate medical care for their infant son, Martin'. The parents knew that a doctor was available and would come, if called. They also knew that their child was ill, off his food, and that he was totally rejecting food for the two days before his death. Failure in such circumstances to obtain any medical aid was clearly a neglect of the child. The live issue in the appeal is whether the neglect was 'wilful'.

The trial judge directed the jury as to the law as follows. He said that

'a person for the purposes of this charge neglects a child if he omits to take such steps in all the circumstances of the case as a reasonable parent would take'.

He then put two questions to the jury:

'Did this [i.e. the conduct of the parents] amount to neglect, objectively speaking? Was it deliberate neglect? I said "deliberate" because that is what "wilful" means . . . The prosecution do not have to prove that the defendants foresaw any result from neglect.'

This direction, as the trial judge recognised, put out of court the defence, which had been urged on the jury, that whatever, in the circumstances known to the appellants, a reasonable parent might have thought or done, these parents honestly believed that medical aid was unnecessary. He dealt with the defence in perfectly clear language, which I now quote:

'In addressing you [defence counsel] put forward this proposition.

(5) 137 JP 334; [1973] 1 All ER 805

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He said that if the defendants, or either of them, do not know any better, how can they be guilty of neglect? If they do not know they are neglecting the child, how can they be guilty of neglect? Members of the jury, I hope it is quite clear on what I have told you that, in my judgment, that is not the law. You ask yourselves whether this particular behaviour that you are at the time considering amounts to neglect. That is to say, you ask yourself what a reasonable parent would have done in the circumstances. Would he or she have behaved in this way? Did the defendants or either of them fail to do that for whatever reasons? If they did, it is objectively neglect by that parent, and the question remains: Is it wilful? As I say, so far as "wilful" is concerned, there is no requirement that the parent who deliberately neglects should be found to have foreseen the consequences.'

Notwithstanding the attractive invocation of general principle to be found in the speeches of my noble and learned friends Lord Diplock and Lord Edmund-Davies, I have come to the conclusion that on the true construction of s. 1 of the Children and Young Persons Act, 1933, the trial judge's direction was correct in law. In my judgment, the conduct must be intentional. But the word does not impart into the statutory offence the requirement of foresight or recklessness as to the consequences of what was done or not done (as the case may be).

The section has a long history. It was drafted in the nineteenth century. No doubt its language is today a little old-fashioned. The section has been frequently considered by courts, which have, since 1898, consistently construed it in the sense of the trial judge's direction in this case. Can so strong and clear a current of judicial interpretation have escaped the notice of Parliament on the occasions since 1898 on which it has had under consideration the law relating to the protection and welfare of children? The most notable of these occasions, so far as concerns the statutory offence which the House now has under consideration, was when Parliament passed into law the Children Act, 1908, and the Children and Young Persons Act, 1932, which, together with the 1908 Act and certain other enactments, were consolidated into the Children and Young Persons Act, 1933.

It is not possible, in my judgment, to achieve a true interpretation of the section without a knowledge of the circumstances in which it entered the law or the history of its judicial treatment thereafter. I am content on this aspect of the matter to adopt gratefully what my noble and learned friend Lord Fraser has said, adding only a few comments of my own.

First, what was the mischief which the section, when first enacted, was intended to remedy? This has always been an important consideration in construing a statute: see *Heydon's Case* (12). A modern affirmation of the principle is to be found in the decision of this House in *Black-Clawson International Ltd v Papierwerke Waldhof-A schaffenburg AG* (13). I quote the words of Lord Reid:

'It has always been said to be important to consider the "mischief"

(12) (1584) 3 Co Rep 7a

(13) [1975] 1 All ER 810; [1975] AC 591

which the Act was apparently intended to remedy. The word "mischief" is traditional. I would expand it in this way. In addition to reading the Act you look at the facts presumed to be known to Parliament when the Bill which became the Act in question was before it, and you consider whether there is disclosed some unsatisfactory state of affairs which Parliament can properly be supposed to have intended to remedy by the Act.'

An indictment lay (and still lies) at common law for neglecting to provide sufficient food, medical aid, or other necessities for a person unable to provide for himself, for whom the defendant was obliged by duty or contract to provide, where such neglect injured the health of that person: see Archbold's Pleading, Evidence and Practice in Criminal Cases (40th edn, p. 2, para. 3 and cases there cited). Neglect of a child was, of course, within the ambit of the offence, and if, in consequence of the neglect the child died, an indictment lay for manslaughter. The summing up of Willes, J., in *R v Wagstaffe* (9) illustrates the nature of the offence at common law as it was understood to be before the first intervention of Parliament in this field. The defendants in that case belonged to a sect calling themselves 'Peculiar People', one of whose tenets was not to call in a surgeon in cases of illness, but to trust in Providence. They knew their child was very ill. They called in the elders of the sect, and offered up prayers to the Lord. The child died. No doctor had been called in; but both parents had been very kind, affectionate and attentive. In directing the jury Willes, J., said that to make out the offence 'gross and culpable negligence' had to be proved; and he left to the jury the defence that these affectionate parents had done what they honestly believed was best for the child. The jury acquitted.

The case was decided on 29th January, 1868. A few months later Parliament enacted the Poor Law Amendment Act, 1858 (royal assent, 31st July). Section 37 provided:

'When any parent shall wilfully neglect to provide adequate food, clothing, medical aid, or lodging for his child . . . whereby the health of such child shall have been or shall be likely to be seriously injured, he shall be guilty of an offence punishable on summary conviction . . .'

Lord Russell, C.J., was surely right when he commented in *R v Senior* (1) that there could be very little doubt that the section was enacted in consequence of the decision in *Wagstaffe's* case (9) because the legislature was of the opinion that circumstances such as existed in that case were not adequately provided for by the law.

Section 37 was considered in *R v Downes* (3). It was another 'Peculiar People' case in which the child had not been given medical aid. His father was indicted for manslaughter. He, bona fide, though erroneously,

(1) 63 JP 8; [1899] 1 QB 283

(3) (1875) 40 JP 438; 1 QBD 25

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believed that medical advice was not required. He also believed that it was wrong to call in medical aid. He was convicted. His appeal against conviction was dismissed. Lord Coleridge, C.J., said that, apart from the statute, he would have paid the greatest consideration to the observations of Willes, J., in *Wagstaffe's case* (9) but he interpreted the statutory words 'wilfully neglect' in the sense of 'an intentional and deliberate abstaining from providing the medical aid, knowing it to be obtainable', and added:

'If he had been proceeded against summarily under the statute, he would clearly have been liable'.

Bramwell, B.'s, short judgment is so revealing as to the meaning put on the word 'wilfully' by the nineteenth century judges and legislators that I quote in full:

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'I am of the same opinion. I agree with my Lord Coleridge as to the difficulty which would have existed had it not been for the statute. But the statute imposes an absolute duty upon parents, whatever their conscientious scruples may be. The prisoner, therefore, wilfully — not maliciously, but intentionally, disobeyed the law, and death ensued in consequence. It is, therefore, manslaughter.'

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This decision is a clear indication that s. 37 was interpreted by the judges as being intended to strengthen the law protecting children by introducing a statutory offence to which, if the need for medical aid were proved, it would be no defence that the parent honestly believed it was not.

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The range of conduct covered by the statutory offence was widened by the Prevention of Cruelty to, and Protection of, Children Act, 1889. That Act made no reference to adequate food, clothing, medical aid or lodging, but by s. 1 formulated the offence in wide terms which have not since been substantially changed. The offence remained one of wilfulness. The 1889 Act was followed by a re-enactment in s. 1 of the Prevention of Cruelty to Children Act, 1894. In *Senior's case* (1), which was decided under the 1894 Act, two points were taken by the defence: first, that, owing to the changed wording of the offence, mere omission to provide medical aid was not neglect, and, secondly, that the offence required an intention to neglect the child, or, in other words, that an honest belief by the defendant that he was not neglecting the child constituted a defence. The defendant was convicted and appealed in a Crown case reserved to a Divisional Court presided over by Lord Russell, C.J. The court had no difficulty in construing the new offence so as to include within it the omission to provide medical aid. The issue, on which the court's decision has ever since been treated as authoritative, was as to the meaning of 'wilfully neglects'. Lord Russell put it thus:

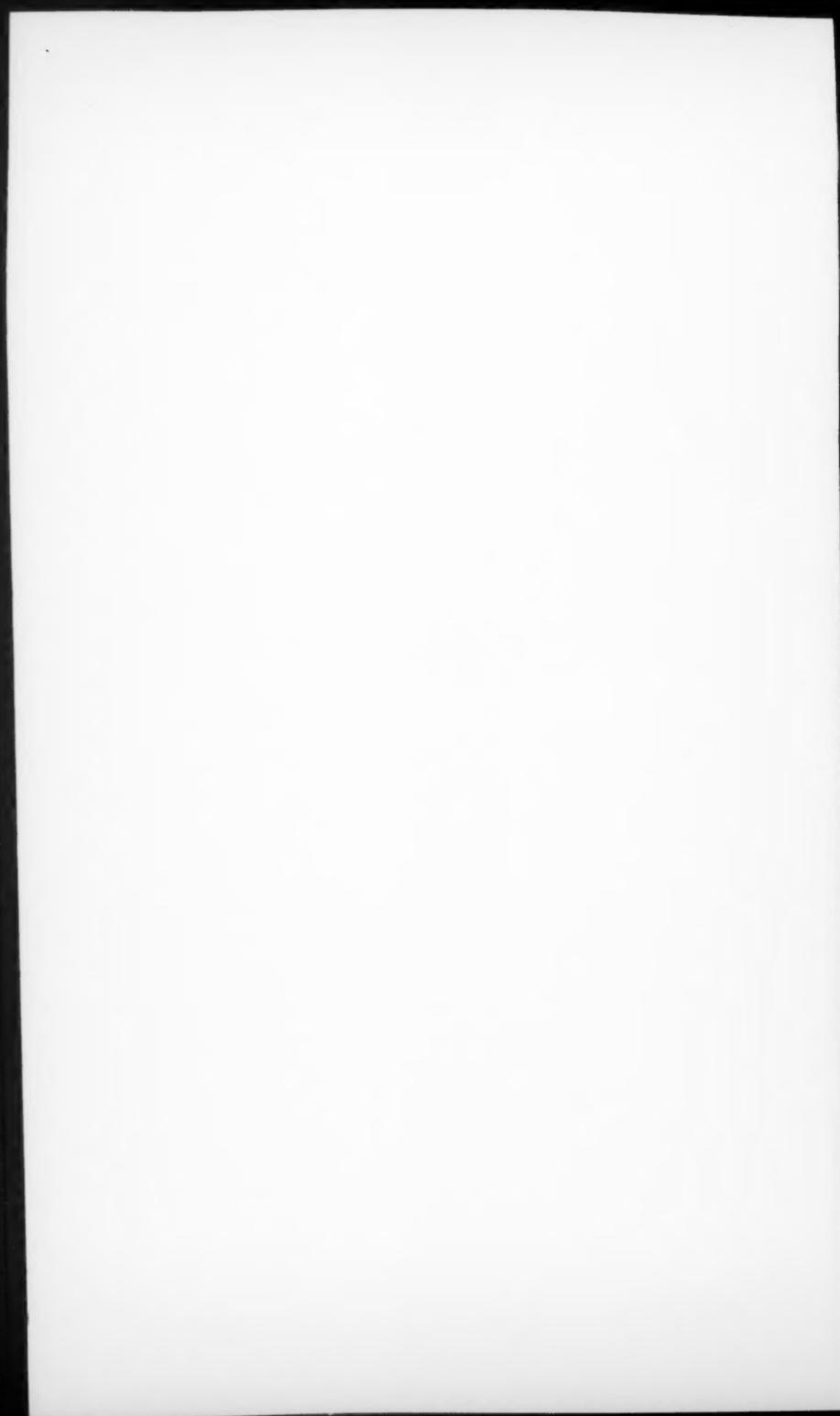
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' "Wilfully" means that the act is done deliberately and intentionally, not by accident or inadvertence, but so that the mind of the person who does the act goes with it. Neglect is the want of reasonable care — that is, the omission of such steps as a reasonable parent would take, such as are usually taken in the ordinary experience of mankind — that is, in such a case as the present, provided the parent had such means as would enable him to take the necessary steps.'

The five other members of the court concurred and the appeal was dismissed.

In 1908 Parliament amended the law so as to put beyond doubt that a failure to provide adequate medical aid constituted neglect. It reintroduced the 1868 formulation while retaining the broad range of the 1889 and 1894 formulation, and did so by a 'deeming' provision which has been retained in the subsequent enactment of 1933. The relevant words of s. 12(1) of the 1908 Act were:

'and for the purposes of this section a parent or other person . . . shall be deemed to have neglected [the child] in a manner likely to cause injury to his health if he fails to provide adequate food, clothing, medical aid, or lodging for the child . . .'

Parliament did not, however, enact any provision modifying or extending the meaning that the judges had put on 'wilfully'.

In 1932 Parliament reviewed the law relating to the protection and welfare of children. The Children and Young Persons Act of that year left untouched s. 12 of the 1908 Act. In 1933 Parliament passed the consolidating statute, the Children and Young Persons Act, 1933, s. 1 of which, with minor drafting changes, re-enacted s. 12 of the 1908 Act.

As my noble and learned friend Lord Fraser has shown, the case law has ever since 1899 followed what has been generally considered to be the interpretation put on the section in its 1894 enactment by the court in *Senior's case* (1). I would not disturb this view of the law. The purpose of Parliamentary intervention from its inception in 1868 has been to strengthen the law's protection of children. In 1875 the court in *Downes's case* (3) interpreted the wilful neglect which Parliament that year made a statutory offence as excluding the 'honest belief' defence. Foresight of consequences was not a requirement of the offence. The courts adopted the same interpretation of wilful neglect after the offence had been broadened and reformulated in 1889 and 1908. I do not accept that, had the courts misunderstood the intention of Parliament, the law would not have been amended. The reasons which could lead Parliament in this field to accept a measure of strict criminal liability are not far to seek. It is an area where the welfare of the child may well justify an exception from the general principle of criminal responsibility.

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I do not share the view expressed by my noble and learned friends Lord Edmund-Davies and Lord Keith that parents who, though not reckless or indifferent to their child's welfare, yet fail through stupidity or immaturity to appreciate the need for medical aid will not be deterred by a criminal sanction. They underrate, with respect, the deterrent power of the law. The existence of a penalty can concentrate and sharpen the minds of men and women. It is for this reason that in some exceptional areas the law accepts strict liability.

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To conclude, the view of the law which I have reached is that the statutory offence is committed (i) if the defendant knew that the child was sick and that medical aid was available or could be obtained and (ii) if a reasonable parent, having the knowledge of the circumstances which the defendant had, would not have failed to provide medical aid. I would, therefore, dismiss the appeal.

Appeals allowed.

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Solicitors: *Burnhams, Wellingborough; Director of Public Prosecutions.*

Reported by G.F.L. Bridgman, Esq., Barrister.

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Re C.B.

COURT OF APPEAL
(Ormrod, L.J., and Bridge, L.J.)
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RE C.B.

Court of Appeal

Child – Care – Voluntary committal to care of local authority – Ward of court – Duty of local authority – Welfare of child paramount consideration – Decision by court of all serious issues relating to child – Need for approval of court to major change in child's way of life.

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An illegitimate child was taken into voluntary care by a local authority and was placed by them with a foster mother. Difficulties having arisen it was decided to make the child a ward of court and an originating summons was issued. The child's mother entered an appearance, but thereafter she seemed to have lost touch with her solicitors. She paid a visit to the child, that being the last time she saw her. She agreed that she was not in a position to take over the child. The social workers involved came to the conclusion that long-term fostering care would have to be provided for the child, and she was transferred to new foster parents. When the matter came before the judge he made an order that the care of the child should be transferred to the mother. On appeal by the local authority, the first foster parent, the long term foster parents and the mother being the respondents,

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Held: the child having been made a ward of court, the duty of the local authority was to obtain the sanction of the court to the transfer of the child to the new foster parents: the court was informed by letter later, but it was then too late for any active step to be taken regarding that matter; the court in its discretion should regard the welfare of the child to be its paramount consideration, but the judge appeared to have thought that the whole case was dominated by s.7(2) of the Family Law Reform Act, 1969, and instead of considering, as he ought to have done, the welfare of the child he was led to consider whether or not there were "exceptional circumstances making it impracticable or undesirable" for the child to be under the care of either of her parents; when a child was made a ward of court it was for the court to decide all the serious issues relating to the child, the persons who had the actual control of the child under the orders of the court should not make any major change in the child's way of life without getting the approval of the court, and that was equally the case whether the care and control of the child was granted to either parent or to some other individual or to a local authority; in the present case it would be entirely wrong and contrary to the child's best interests to hand her over to her natural parents who were total strangers to her, and the right course to follow was to leave the child with her present foster parents.

Re C.B.

Court of Appeal

Appeal by the London Borough of Tower Hamlets against a decision of Bush, J., in wardship proceedings.

S Ritchie QC and M McNab for the local authority.

A M Ryan for the long term foster parents.

L Swift QC and P Scriven for the mother.

B Capstick QC and E Szwed for the first foster mother.

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ORMROD, L.J.: This is an appeal by the local authority in wardship proceedings concerning a little girl whom I will call Claire. It is a very sensitive case and one which should be reported in such a way as to avoid identifying the child or any of the persons concerned in the case because it would be extremely sad if any of them were subjected to any kind of publicity to add to the distresses that they have already suffered in one way another. It is an important case from the point of view of local authorities, because it raises at least two points under the wardship jurisdiction which require to be made clear, and I will come to them in due course. At the beginning of the appeal, counsel for the present foster parents of the child applied for them to be joined as plaintiffs in the originating summons and appellants in this court. We decided that it was most desirable that they should be joined, and in fact had that application not been made it is probable that the court itself would have suggested it. At present, for obvious reasons, they have been described in the application by their Christian names, but it seems to me, subject to anything that counsel may subsequently say, that so far as the court record itself is concerned, their surnames must appear on the court record. There is no necessity, as I see it at present, for any document or any copies of these documents to be circulated. It would be quite enough if the court record shows their true names because they must be capable of being identified in the event of any subsequent application.

Before I come to deal with the important points, I will give a brief

- Re C.B.** summary of the facts. This child was born on 23rd January, 1977, so she is now 3½ years old. She was the illegitimate child of her mother, who was then only 17, she herself having been born on 20th January, 1960. She had had a very turbulent life, had been in care, and had had experience of a good deal of difficulty and violence in her own family. She had school problems which led to her being put into care. She became pregnant as a result of intercourse with the father of this child, and when her pregnancy was discovered these two, who were then very young, ceased to see one another. She was living with her mother, and her mother was living with a man who, it is said, was a violent person.
- Court of Appeal**
- Ormrod, L.J.**
- i This girl, not surprisingly with her background and faced with this child, was in a very difficult position. It is said that she often went out, not surprisingly at her age, leaving the child in the care of her mother, and her situation in her mother's home was obviously one of great stress and difficulty. So much so, that when the child was about three months old, she left home, taking the child with her, and went to stay with friends for a matter of some two or three months. She then moved back into her mother's house. On 23rd October, 1977, (the child being then about eight or nine months old) she left the child altogether in the care of her own mother, that is the child's grandmother, and in a matter of a few days, less than a week later, the grandmother asked for the child to be taken into voluntary care by the local authority. The local authority were able to contact the mother and she agreed. So, on 31st October, 1977, Claire was placed with a lady who has been referred to throughout this case as Mrs R, that is, the first foster mother. Mrs R was one of the local authority's short-term foster parents whom they used with great success from time to time and on whom they relied. She was a divorced woman with three children who were at that time aged 16, 13 and 11, and she had one other foster child with her who was, we are told, about the same age as Claire. There is no doubt whatever that Mrs R made an admirable home for this baby. She is certainly entitled to every credit for what she did for her and no one could have anything but sympathy for her in what later happened. It is the fate of foster mothers to become attached to their foster children, which is what they are there for, and for the foster children to become fond of the foster mothers. Sooner or later, so often, a break has to be made, with all the distress and trauma which is inevitable in that situation. It was contemplated by both Mrs R and the local authority that the child's stay with her would be essentially a short-term fostering. The local authority have other people whom they call 'long-term' foster parents and whom they choose, I suppose, on some rather different basis than they choose the 'short-term' foster parents.
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- In the early stages the mother occasionally visited the child. Counsel who has appeared for the local authority in this court gave us six dates between 7th November, 1977, and 25th May, 1978, but it is said, and one can well understand it (and certainly would not make any criticism of it) that the mother found these visits distressing. In April, 1978, the mother married a man, not the putative father of the child, and went to live with him with his parents. At that stage,

very soon after the marriage, the mother indicated that she wanted Claire back. As the child was in voluntary care, subject only to giving the necessary 28 days' notice because the child had been in care so long, the mother would, *prima facie*, be entitled to have had the child back. But she did not give the 28 days' notice, so that the local authority's care under the Children Act, 1948, continued.

A social worker, Mr Gilding, who was in charge of the case and who (everyone agrees) was a very experienced person, had become anxious about the situation which had developed. The mother then was pregnant with another child; the local authority did not know anything about her new husband and they did not know anything about the accommodation or what arrangements she could possibly make for Claire if Claire ceased to be in their legal care. In those circumstances, faced with the difficulties which local authorities have to contend with in this area of their duties owing to the difficulties of the legislation which they have to operate, it was decided that the right thing, in the interests of Claire, was to make the child a ward of court. The object of doing that is to fill a serious gap in the local authorities' powers where children are concerned, when a period of voluntary care looks as if it is going to be brought to an end by the withdrawal of the consent of the relevant parent. This produces a situation of great difficulty for the local authorities; they have obviously a very important and serious duty to the child in such cases, and it is all too easy to see how the interests of the child may clash with the wishes of the parent. The local authority's social workers in such a case, and we all should recognise this, are in an invidious position, they have great responsibility, great moral responsibility, but, as some would say, inadequate legal powers, to discharge those responsibilities. So it has become quite frequent for local authorities nowadays to resort to the ward of court procedure to help them over their difficulties. This court has never said, and I hope never will say, anything to discourage that practice. It has always seemed to me that when a serious dispute arises about the welfare of a child it is asking too much for social workers to be made to be judges as well as social workers in these cases, and that it is to the advantage of all parties, including the local authority, to resort to the court in order that a judge may take the responsibility for the decision. So that was what it was decided should be done and on 26th May, 1978, the originating summons was issued. The matter came before Mr Registrar Kenworthy on 15th June, 1978, for directions and a preliminary order. He directed that the mother file an affidavit within 28 days, and made an order granting what is called interim care and control to the local authority. I will come back to that later. At that stage the mother instructed solicitors and they entered an appearance on her behalf, but no affidavit was filed by her and thereafter she seems to have lost touch with her solicitors. About the same time, that is in July, 1978, she left her husband and returned to live with her mother, but she did not get in contact with her solicitors and they did not seem to be able to find her, with the result that in October, 1978, they applied for their legal aid certificate to be discharged because they could not get instructions, and that was done.

In June, 1978, the mother did pay a visit to this child, but thereafter she did not see the child again throughout that year. Also in

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July, 1978, the long-term problem of Claire was coming to the surface so far as the local authority social workers were concerned. Mr Gilding, who was in charge of the case, was beginning to think of long-term fostering for this child, with a view ultimately to adoption, on the footing that the mother had in fact dropped out of the child's life altogether or almost altogether. At that time, Mrs R, the short-term mother, was anxious that some such step should be taken, but at that moment, most tragically for all concerned in this case, the Tower Hamlets social workers' strike began. It is not for this court to make any comment on that, except to note its consequences. The strike continued from August, 1978, until June, 1979, a very long time in the lives of the children who were in the charge of the social workers in Tower Hamlets. But, very conscientiously, Mr Gilding, in spite of the strike, paid a visit to see how this child was going on.

In January, 1979, the mother did pay another visit to the child, but that was the last time that she had seen this child. It is not clear why she did not visit her, there seems to have been no physical difficulty and no obstruction put in her way by Mrs R, but she did not. She said to the judge that it was a matter which caused her great distress and she found it difficult to do it. I think that all of us can understand that aspect of it, and it is certainly no part of the court's duty to criticise her in any way at all. It is a mistake, I think, in these cases for parties to criticise one another as to what they did or did not do in relation to the people concerned. The only relevant question is: What effect did the conduct have on the child? The effect it had on the child is obvious. The child has never formed any kind of relationship with her mother, so that from the point of view of the child the mother is a stranger. Parents may have some sense of blood ties, but the one thing that a three-year old child does not have is any sense of a blood tie to an absent mother or father. Without any criticism of the mother, she has brought about a situation, so far as this little girl is concerned, which is unalterable and which the court has to deal with as best it can. It is part of the facts and its significance is to be assessed in terms of its effects on the child now and in the future.

In February, 1979, Mr Gilding paid his unofficial visit, and there is no doubt that he was, as he said, alarmed by what he found. The situation had changed with regard to Mrs R in an important way. She had formed an association with a man of more or less, I think, her own age but not at all in good health, who had parted from his wife and had two children who were aged twelve and nine. He and the two children had moved into Mrs R's house, and about the same time, I think, her eldest daughter left the house. She moved out but I do not suggest anything was wrong in her leaving. There is no doubt Mr Gilding found the situation there in Mrs R's house disturbing. In June, 1979, there were discussions about this, when the strike ended, and Mr Gilding was in a position to take action. The situation was that he felt the household was overcrowded. It is true that head-counting made them only one more than they had been in the past. Neither Mrs R nor her cohabitee were in good health (not to any significant extent I think) but what disturbed Mr Gilding was the child. He thought her attitude had changed and he described her as 'clinging to Mrs R,

banging her head and rocking about' and generally Mr Gilding was disturbed by what he found. It is always difficult to describe why an experienced person like Mr Gilding is disturbed by what he finds, and it may be that a description of the child's behaviour is not all that convincing to a court, but the court should, I think, take note of the fact that a very experienced social worker was seriously disturbed by what he found.

At that stage, according to Mr Gilding (I think it may have been in issue), he saw the mother and there was a discussion about the possibility of adoption, and arrangements were made for the mother to see an adoption officer. Unfortunately, the mother again at this stage was pregnant, and on 26th June she was seen when she was in hospital. She was living in temporary council accommodation with her child, who had been born (another little girl) on 5th December, 1978. At that stage the mother agreed that she was not in a position to take over Claire, but she would not agree to an adoption, as she was perfectly entitled not to do.

But meanwhile the social workers involved had come to the conclusion that in those circumstances long-term arrangements would have to be made for Claire. They did not think that Mrs R was in a position to provide long-term fostering care for the child or, perhaps, not able to do it satisfactorily. At any rate they came to that conclusion, — and there was the usual conference on the matter — that a move of this child was necessary. Mrs R was told about this and, as one can understand, she was extremely upset. The child had been with her so long that obviously they had each become very fond of each other, and a break could be nothing but painful on both sides. Not surprisingly, her cohabitee was very upset and angry, but Mrs R did her best to help, and there is no doubt she did honestly try her best, in spite of the distress which this caused her.

Attempts were made, at that stage, to get in touch with the mother, but they were not successful. The judge said that he did not think that sufficient effort had been made by the local authority; he thought that they could have got in touch with the mother if they had tried harder. So on 28th September, 1979, Claire was transferred to her new foster parents, that is, the persons who we have just given leave to join in these proceedings, and she has been with those new foster parents since 28th September, 1979. On 3rd October both the mother and, I think, Mrs R were distressed and upset about this change and they both went to see one of the social workers, a Mrs Hill. The mother asked to see Claire although she did not then give any clear indication that she was going to ask for the child back. What the local authority did not do was to tell the court, the registrar, of this proposed change before it was made, and the judge, in my view rightly, criticised the local authority for failing to take that step because it is fundamental in wardship jurisdiction that no serious change in the arrangements for a ward should be made without reference to the court. It is true that this wardship had not proceeded further than the preliminary stages, but there is no doubt that in law the duty of the local authority was to inform the court and obtain the sanction of the registrar to make the move. It would almost certainly have given the mother an opportunity to make representations, and it would have given Mrs R, too, an oppor-

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Re C.B. tunity to make representations to the court, if either or both of them wished to do so.

Court of Appeal The local authority did inform the court, on 11th October, 1979, by letter of the change, but that was after it had happened and it was too late then to take any active step. About the same time, some time in October, the mother seems to have got into touch again with the child's father, and the two of them went to see Mr Gilding. What she was wanting at that stage is not very clear. Mr Gilding said she did not want the child herself but wanted the child returned to Mrs R, and indicated that she was prepared to fight all and sundry at that stage over the child. Mrs R, by this time, had taken advice, and she applied on 8th November to intervene in the proceedings, and on 22nd November she was joined as a defendant in the proceedings by the registrar, who ordered a welfare officer's report. Thereafter, the father and mother seem to have seen a lot of one another and in March or April, 1980, they went to live together and they are at present living together. It was in that state of affairs that the matter came before Bush, J., whose order is the subject-matter of this appeal. Having heard the evidence and having had the advantage of hearing all the social workers concerned and having an extremely full and detailed welfare report, Bush, J., made an order that the care of Claire should be transferred to her mother. That order was a few days later stayed by this court pending appeal, and now the appeal comes on before us.

i The local authority are the first plaintiffs; the present foster parents are the second and third plaintiffs/appellants; the first defendant/respondent is the mother and the second defendant/respondent is Mrs R. On the facts of the case, the position is quite simple. Stated baldly, they are these. This child has known one stable home up to September, 1979, and only one stable home, and that is with Mrs R. The mother is a virtual stranger to her; the father is a total stranger to her. But since September, 1979, she has begun to make, and it appears from all the evidence, particularly the welfare report and the short affidavit which has been filed today by the foster parents, is making, a successful relationship with her present foster parents. There she is alone with no other children, and they are described as eminently suitable foster parents. It is obvious from reading their brief affidavits that they are sensitive, responsible, and reliable people, and from the evidence (such as it is and it is strong from the welfare officer and from the present foster parents themselves) that the child is extremely well placed with them and is forming a secure relationship with them.

ii **v** So the judge, in practice, had three possible alternative solutions to this problem: one was to leave the child where she was with the present foster parents; another was to send her back to her pseudo-mother, her mother substitute, Mrs R; and the third was to hand her over to her own mother. The indications for the first course to be followed, that is leaving the child where she is with the present foster parents, are, first, that she has settled down with them; secondly, that they are in a position to offer her the very highest standard of care, and, thirdly, that any further changes in this child's life are bound to add to her intense insecurity and are bound to be very upsetting to her, if not in the short-term then in the long-term. There are all sorts of psychological problems which might or might not arise from moving her

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away from the present foster parents. The attraction of Mrs R, of course, is that the child would be going back to an environment with which she is familiar and where she might feel equally secure. But against that, the court has to bear in mind the view of the social workers concerned that this arrangement was not going to be viable in the long-term and might have to be changed later. However it was clearly an alternative which was a practical alternative. The third, proposal that Clair should be handed over to her own mother and father, although emotionally attractive in my judgment has very little to support it. It is absolutely vital in these cases that we look at reality and look at it through the eyes of the child. It is clear that the child would be grossly disturbed by being handed over to yet a third couple with whom she has had no contact at all, although she may have some vague memory of her mother. So it would require, I think, a very, very strong case to justify taking this child of three and handing her over to total strangers simply because they are her blood mother and blood father.

The judge did not, as I see it, approach the case in the way in which I have just indicated. In his judgment, having set out very fairly the facts, he said:

'This decision does not turn on the relative merits of John and Margaret [the present foster parents] and the mother in the ideal parents stakes. No doubt the mother would come off second best, particularly as she has not been given a chance to show what she can do with Claire. The question turns on whether the local authority has shown that it is undesirable that the child should be or continue to be under the care of either of her parents. The court must look at the totality of the circumstances, bearing in mind that Parliament intended that children should remain with their parents if at all possible, and bearing in mind also that the welfare of a child is the paramount consideration.'

With respect to the judge I think he was wrong and misdirected himself in that passage because the decision *does* turn on what he called 'the relative merits of John and Margaret and the mother in the ideal parents stakes'. It may be that the judge was confused by the form of the relief which was sought by the originating summons. In it the local authority asked, first, that the child should remain a ward of court during her minority or until further order, and, secondly, that the care and control of the minor should be committed to them. As I have already said, the registrar made an order for interim care and control by the local authority. It seems to have got into the mind of the judge that the whole case was dominated and controlled by s.7(2) of the Family Law Reform Act, 1969. That subsection, which is in identical terms with the corresponding provision in the Matrimonial Causes Act, 1973. s.43(1), reads:

'Where it appears to the court that there are exceptional circumstances making it impracticable or undesirable for a ward of court to be, or continue to be, under the care of either of his parents or

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- Re C.B.** of any other individual the court may, if it thinks fit, make an order committing the care of the ward to a local authority; and thereupon Part II of the Children Act, 1948 (which relates to the treatment of children in the care of a local authority), shall, subject to the next following subsection, apply as if the child had been received by the local authority into their care under s.1 of that Act.'
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- i That is the section which the judge treated as controlling the whole of the case. So, instead of considering who was going to look after this child and considering, as he ought to have done, what the welfare of the child as the paramount consideration required, he was led to consider whether or not there were exceptional circumstances making it 'impracticable or undesirable' for the ward to be under the care of either of her parents. He treated the matter as one of law. He felt that he had to find, first, that the circumstances were exceptional, and, secondly, he had to decide whether it was impracticable or undesirable for the ward to continue to be in the care of either of her parents or any other individual. In fact, of course, s.7(2) of the 1969 Act never applied at all in this case because at all times the proposal of the local authority was that the child should remain in the care of the present foster parents, that is 'another individual' within s.7(2). Nor is it at all difficult, in a case like this, to find exceptional circumstances. No one, I venture to think, would dream of making an order committing the care of a ward to a local authority unless the circumstances were exceptional. Nor would they contemplate doing it unless it was the only practical solution open to the court at the time.
- ii It was a mistake to treat this case as if it was a s.7(2) case because the local authority were the plaintiffs. This is the first point to be made so far as the wardship jurisdiction is concerned. It is an unfettered jurisdiction to place the ward in the care and control of any person who can best look after him or her.
- iv Ever since *J. v. C* (1), the principles are absolutely clear: the court in its discretion must decide what the paramount interests of the child require. It is not concerned with allocating blame or adjusting rival claims. It has to make a decision, sufficiently difficult in all conscience, but the decision it has to make is what is in the best interest of this child at this stage.
- v Looking as far ahead as is possible to look, and making as wise a decision about the child's future as it is possible for the court to make, if the court thinks that it would be desirable in the interests of the child to make an order committing the child to the care and control of the local authority, so be it. But it is not a care order under the children legislation; it is an order which has some similar effects in the sense that the local authority has powers over the child and is entitled to exercise them, but subject always to the court's supervision.
- vi So far as wardship is concerned, this should be said at the outset, and I say it with sympathy for local authorities and social workers because I know the difficulties under which they work, but when a child is made a ward of court it means what it says. The child is a ward of the court and it is for the court to decide all the serious issues relating to the child. That is why in orders made in the wardship jurisdiction the court never grants custody to anybody. It used to be said in the old

days that the court 'retained custody in itself', which was only a form of words to emphasise the fact that the court remains in control of the child and it grants care and control to somebody to look after the child in the ordinary day-to-day way, and, although I do not want to make too much of this, if the child is a ward of the court in that sense, it is only reasonable that the persons who have the actual control of the child under the order of the court should not make any major change in the child's way of life without getting the approval of the court. This may be an inconvenience, but this case illustrates very well how important it is to observe these sometimes tiresome routine rules because there is no doubt that the whole course of this case would have been different if the matter had come before the court in, say, August or September, 1979, before the change to new foster parents was made.

I am most anxious to emphasise that once the child is a ward of the court the major decisions relating to that child are for the court to take. That is equally the case whether the care and control is granted to either parent or to some other individual or to a local authority.

The judge unfortunately did not approach the matter, I think, in the right way. He was side-tracked by considering whether he had the necessary jurisdiction under s.7(2) of the 1969 Act. But in this case the local authority were themselves the plaintiffs in the originating summons asking for 'care and control', not for an order under s.7(2). Had he had the present foster parents before him as parties, I do not think that this error would have crept in. The result is that, with respect to the judge, the conclusion is inescapable that he exercised his discretion on an entirely wrong basis. He did not, at any stage, compare the mother's proposals with the present foster parents' proposals for the child. He did not weigh one against the other and make an assessment of the advantages to the child in regard to one course or the other, in the short-term or the long-term. He was almost wholly concerned with deciding whether the local authority had made out their case under s.7(2), but, as I have already said, if a local authority takes the initiative in making a child a ward I do not think that s.7(2) comes into the case at all. Section 7(2) was passed to give the court power in proceedings between parents, or between a parent and a third party, to make an order committing the child to the care of the local authority or to make it clear that the court, in wardship proceedings, had the same powers as it has under the Matrimonial Causes Act 1973.

That being the case, it is for this court to exercise its discretion on the material as it is before it. From what I have said already, it is obvious what view I take. To my mind, it would be entirely wrong and contrary to this child's best interests to hand her over to her natural parents who, as I have said before, are total strangers to her. If they were not her natural parents, no one could imagine for a moment making such an order. So the real issue is whether she should be in the care and control of her present foster parents, or whether she should go back to Mrs R.

I hope I have said enough to make it plain to Mrs R that I feel very sorry for and sympathetic towards her. She has had a tragic experience with this child, but once the break has been made between her and the child it would be wrong, in my view, to try to go back, unless there was

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Re C.B. some pretty powerful indication that that would be the best course. If the present foster parents were not able to get on terms with the child, or the child was fretting for Mrs R, then there might have been a strong case for saying that she should go back to Mrs R, but the evidence is really all the other way. Although the trauma of that break from Mrs R is going to be with this child, I should think, for a very long time indeed, and I think it is going to be possible to repair that damage. It may well be that, the step having been taken, it has been taken for the best (I am not suggesting for a moment that the child would be better off with Mrs R than she will be with her present foster parents). I do not think it is possible to say that it would be in her interests to try to go backwards in her development. In view of the admirable reports as to the present foster parents, the proposed adopters, contained in the welfare officer's report, I think that the right course is to follow the strong recommendation of the welfare officers, not only because it is made by them, but because it seems to me to be plain and good commonsense looked at from the point of view of this child.

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I would like to finish where I began by saying that what we are concerned with is the child's future. We are not concerned with the natural parents' position. We have to judge the situation as it is at the moment, no matter how it has come about, and answer the question: Where does the future of this child best lie? I answer that without any hesitation by saying: with her present foster parents. In those circumstances, I would allow the appeal and make the order in that form.

BRIDGE, L.J.: I agree. In the proceedings below, this case, as it seems to me, was bedevilled by the attention which was directed to and the proposition derived from s. 7(2) of the Family Law Reform Act, 1969. The judge said of that section:

'the section emphasises that, if at all possible, it is the intention of Parliament that parents should not lose their children to the care of local authorities except for good cause and in exceptional circumstances. [Then, in a passage which has already been referred to by Ormrod, L.J., he said:] The court must look at the totality of the circumstances bearing in mind that Parliament intended that children should remain with their parents if at all possible.'

Those two propositions, thought to be derived from s. 7(2), seem to me to have dominated the judge's approach to this whole problem. Now the situation with which s. 7(2) is dealing is a situation where it is impracticable or undesirable for a ward of court to be under the care of either of his parents or any other individual, and I emphasise those concluding words, 'or any other individual', and once that is appreciated it becomes apparent that s. 7(2) had nothing whatever to do with this case. No one could possibly have suggested that it was either impracticable or undesirable in this case for Claire to continue in the custody of Mrs R, the previous foster parent, or of the natural parents.

The reason why s. 7(2) seems to have loomed so large was that by

what seems to have been a purely procedural accident the present foster parents were not parties before the court, so it was the local authority who, in form, were applying for an order to be made in their favour. But in substance, nobody could have been in any doubt that the issue was whether the little girl should be in the care of her natural parents, or one or other of the sets of foster parents who were 'other individuals' within the meaning of s. 7(2). In fact, s. 7(2) indicates no parliamentary *a priori* preference for giving the care of a child to natural parents as against giving it to anybody else. The paramount consideration in a simple case like this, and the sole consideration, is what will best serve the welfare of the child. Once the misapprehension derived from s. 7(2) is cleared out of the way, and the case is approached on the basis of what will best serve the welfare of this little girl of now just over three years old, the solution to the problem to my mind stands out so as to be unmistakable.

Here is a little girl who, in her short life, has already been disturbed by a number of traumatic experiences. Now for the last eight months she has been in what, from all accounts, appears to be an ideal home, in the care of the present foster parents of whom the welfare officer in her report speaks in glowing terms. From the evidence before us, it is apparent that signs of disturbed behaviour which were apparent when the child first went to them are greatly improved, and that in the eight months she has been with them the present foster parents and the little girl have formed extremely strong bonds of mutual affection. So strongly did the welfare officer feel about the matter that she concluded her report by saying: 'I feel that it would be disastrous for Claire to be uprooted yet again and for the fine progress with John and Margaret [the present foster parents] have made with her be interrupted.'

Against this background, when one considers the possibility of the child being returned to the care of her natural mother and father, it seems to me clear that that would be a course which would not serve the welfare of the child. As Ormrod, L.J., has pointed out, the father is a total stranger to the little girl, and the mother, through no fault of her own but inescapably in fact, has now become a virtual stranger. If one were to ask the question whether it would be in the interests of this child at the impressionable age of just over three to be removed yet again from the home where she has settled and to be transferred to total strangers who were not related to her by blood, the answer would be so obvious that one would laugh the suggestion out of court. The sole argument before this court, and the argument which misled the trial judge, as I think, is the argument that the tie of blood in some way supersedes other considerations and determines what the child's future must be unless there is some overwhelming consideration to the contrary.

Accordingly, I reach, without hesitation, the conclusion that the judge's order was erroneous. I think the question whether the child should stay with the present foster parents or return to Mrs R, where she was for so long, is a much more difficult question, but on that the judge came to the conclusion that, if it were not for the involvement of the natural mother, the balance of the decision would be to leave the child with the present foster parents rather than risk returning her to Mrs R, and he explained what he thought the risk involved in that

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Re C.B. course would be. So for the reasons he gave, and for the reasons given in the judgment of Ormrod, L.J., I agree that the decision should be to leave the child with the present foster parents rather than to return her to Mrs R. I accordingly agree that this appeal should be allowed and I agree with the order proposed by Ormrod, L.J.

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Orders accordingly.

i Solicitors: H.D. Cook; Denton Hall & Burgin; Breeze, Benton & Co; Alexander Johnson.

Reported by G.F.L. Bridgman, Esq., Barrister.

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(Lawton, L.J., Borcham, J., and Comyn, J.)
March 17, 1980
R. v. NAZARI and OTHERS

iv Immigration - Offence by immigrant - Sentence - Recommendation for deportation - Principles on which orders recommending deportation should be made.

Three immigrants, two applicants and one appellant, had been convicted or pleaded guilty to charges of offences in the United Kingdom and had been recommended for deportation. Two applied for leave to appeal against the orders of deportation and one appealed against the order made in his case.

v Held: it was clear that Parliament, when passing the Immigration Act, 1971, intended that there should be a full inquiry into all the circumstances of a case before any order recommending deportation was made; it would be advisable for judges to invite counsel to address them specifically on the possibility of a recommendation for deportation being made. In considering whether to recommend deportation, the court must decide whether deportation was justified by the potential detriment to this country by the continued presence of the offender. The United Kingdom had no use for criminals of other nations particularly if they had committed serious crimes or had long criminal records. The more serious the crime or the longer the record the more obvious it was that a recommendation should be made. A series of minor offences might turn a minor matter into something justifying a recommendation. Even a first offence of shoplifting might justify a recommendation if a gang were involved who intended to carry out planned raids on departmental stores. The courts of this country were not concerned with the political systems of other countries; it was for the Home Secretary to decide whether returning an offender to his country would have unduly harsh consequences. It was proper that a court should consider the effect

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of a recommendation on others not before the court. The courts had no wish to break up families or to impose hardships on those innocent of crimes. These guidelines for courts when dealing with applications for deportation orders were not rigid rules of law; there might be cases which were exceptions by reason of the evidence therein.

Appeal by Rohan Dissanayake, a national of Sri Lanka, against an order recommending his deportation made at the Central Criminal Court, and Applications by Fazlollah Nazari, an Iranian, Joseph Fernandez, a Spanish citizen, and Adamson for leave to appeal against orders recommending that they be deported made at the Central Criminal Court.

R J Harvey for the applicant Nazari.

S Hopkins for the appellant Dissanayake.

J Laws for the Crown.

The applicants Fernandez and Adamson did not appear.

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LAWTON, L.J.: During the last decade this court has from time to time indicated the principles on which orders recommending deportation should be made. It has been suggested that some of the decisions are conflicting. As a result it was decided that four cases raising different matters for consideration should be heard one after the other so that the court would have an opportunity of reviewing the principles which are applicable. It is first necessary to set out the facts of each case so far as they are relevant.

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On 7th September, 1979, in the Crown Court at Reading the applicant, Fazlollah Nazari, pleaded guilty to being knowingly concerned in the fraudulent evasion of the prohibition on the importation of a controlled drug. He was sentenced to four years' imprisonment and recommended for deportation.

He is a young man of Iranian citizenship. In the summer of 1979 he was studying at a polytechnic in the London area. He arrived at Heathrow Airport on 19th June, 1979, carrying a black suitcase. Customs officers were suspicious about the suitcase. He was allowed to pass through the customs but was kept under observation in case he met somebody and handed over the suitcase. He did not meet anybody. Before he left the airport he was detained. The suitcase was opened and found to contain 1.95 kg of opium in the form of sticks. It was accepted by the prosecution that opium in that form could not be converted into heroin.

There is no application for leave to appeal against the sentence of four years' imprisonment, which was in line with the kind of sentences which are passed on those who try to smuggle dangerous drugs into the United Kingdom. Complaint is made about the recommendation for deportation. Counsel for Nazari has called attention to what might be called the general compassionate grounds relating to this young man. It is said that if he is deported he will not be able to continue his studies in England, that he will probably be separated from the English girl whom he hopes to marry, and that he is not likely to commit this

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kind of offence again. But the major part of counsel's submission was directed to the proposition that if the applicant is deported he will be sent back to Iran, where the present government is likely to take a very serious view of his activities and he may face a court which will have jurisdiction to pass, and may pass, sentence of death on him.

The evidence relating to what is likely to happen to the applicant if and when he returns to Iran is unsatisfactory. So far as the recorder was concerned, a statement to the effect stated above was set out in the social inquiry report. The probation officer who made it said that at some date which he did not specify he had spoken on the telephone to somebody at the Iranian Embassy who had confirmed that very serious consequences would befall the applicant if he returns to Iran. Before this court today counsel informed us that he personally had spoken to Professor Coulson of the School of Oriental Studies of London University who had told him that the type of consequences which have been indicated might befall the applicant. In addition counsel put in an affidavit sworn by an Iranian holding a degree in law who is at present an articled clerk with firm of solicitors. He deposed that under Iranian law serious consequences, including the death penalty, could fall on anyone who imported dangerous drugs. What he meant by importing dangerous drugs was not clear. We do not know whether the deponent was talking about importation into Iran or into the United Kingdom. It seems odd that any Iranian court would have jurisdiction over somebody who was arrested for importing dangerous drugs into the United Kingdom. In this class of case, when it is suggested that unpleasant consequences are likely to follow for anyone recommended for deportation if the Home Secretary makes an order of deportation, it is essential that proper evidence should be before the court; the court cannot act on the kind of evidence which has been put before it in this case.

R. v. Dissanayake

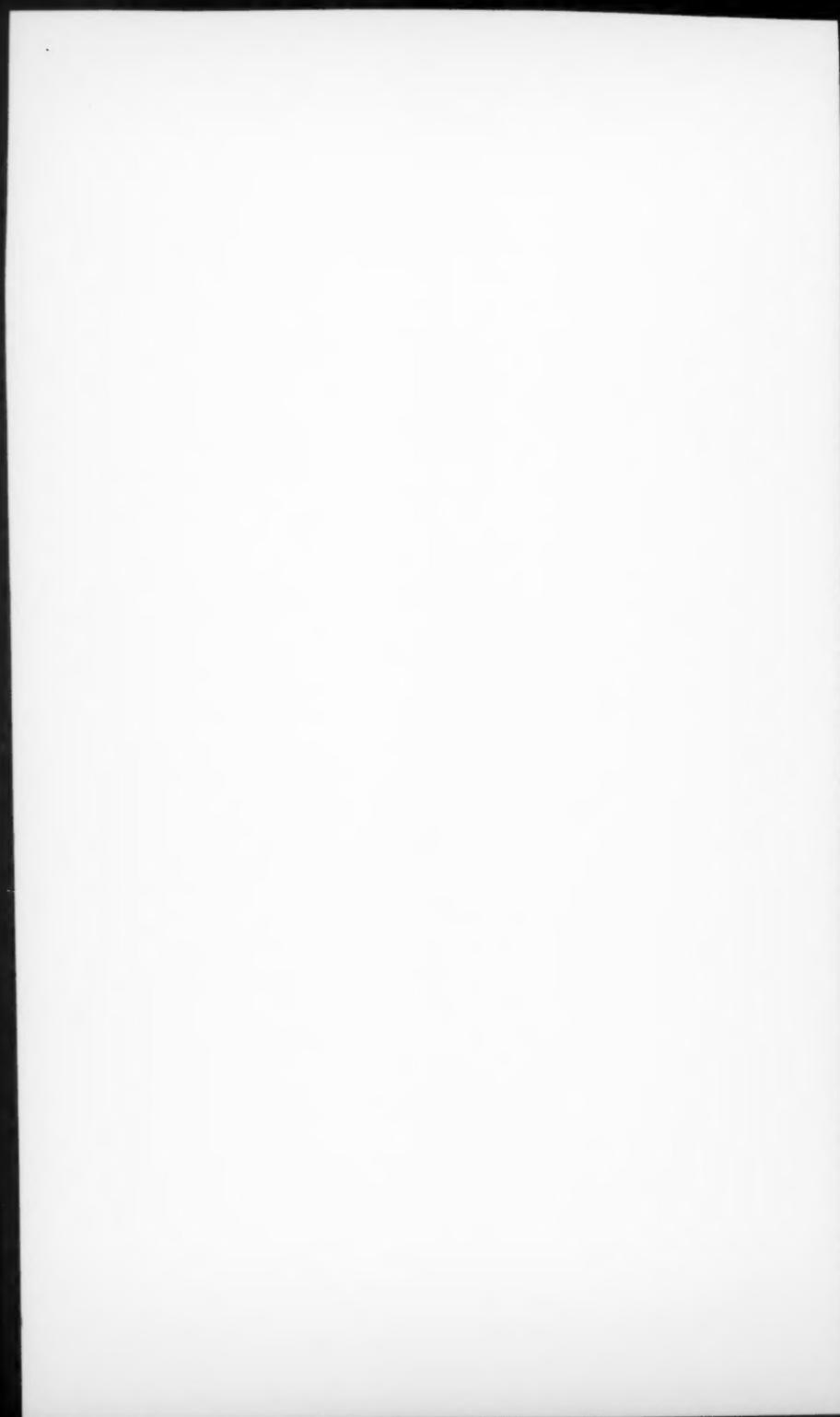
We turn to the next case, that of the appellant Rohan Shivantha Dissanayake. Leave to appeal against sentence has been granted to him by the single judge. Counsel for Dissanayake has urged on us that the sentence of imprisonment as well as the order recommending deportation was wrong.

On 12th March, 1979, in the Central Criminal Court before Melford Stevenson, J., the appellant, who had been indicted for murder, pleaded guilty to manslaughter, the basis of his plea being diminished responsibility. There was in addition a suggestion, but no more than a suggestion, that he had been provoked into doing that which he did. He was sentenced to five years' imprisonment and recommended for deportation. In our judgment men who batter their wives to death should consider themselves fortunate to receive a sentence as light as five years. It could have been much longer without in any way being excessive.

In our judgment there is nothing in that part of the appeal which relates to the sentence of imprisonment. We will consider the recommendation for deportation in the light of the observations that we propose making after we have recounted the facts of the other cases.

We come now to the case of the applicants Fernandez and Adamson.





Adamson defended himself at the trial. That was by his own choice. He has had legal aid for the purpose of advising him about the procedure to be adopted for appealing against sentence. He now asks for an adjournment so that he can have more advice as to his grounds of appeal. We feel impelled, albeit with some reluctance, to agree to his application for leave to appeal against conviction being adjourned. It will be adjourned. He will be granted legal aid for the purpose of getting advice about his grounds of appeal. But he should clearly understand that he must get the advice as quickly as he can, and once he has got it the case will be restored to the list as soon as possible thereafter. There will be no further adjournments.

Turning now to the case of Fernandez, on 25th September, 1979, at the Central Criminal Court he and Adamson were convicted of conspiracy to rob and aggravated burglary. On 9th October, 1979, Fernandez was sentenced to 18 months' imprisonment on each count of the indictment on which he was convicted and, in addition, sentences of three months and three months consecutive, suspended for two years on 10th June, 1977, were ordered to take effect, varied to a total of three months' imprisonment concurrent. He was also recommended for deportation. Fernandez applied for leave to appeal against his sentence. The single judge referred his application to the full court, and we grant him leave to appeal against sentence. He himself is not present today, but we have had the benefit (and it has been a great benefit in the court, and indeed to him) to have his wife here to speak for him. He has a statutory right to appear himself, but, having regard to what we propose to say about the recommendation for deportation, he will probably not want to come back to this court, though he is at liberty to do so if he wishes.

Fernandez comes from Galicia, in north-west Spain, and has been in this country many years. During most of the time that he has been here he has been a waiter. In June, 1977, when he was working in a night club he and others decided to rob his employer of the club takings while he was on his way home with them. He and his co-conspirators (there were four of them altogether) met at a public house and made plans. They reconnoitred the employer's house and agreed to break into it and to overpower anyone who might be there. They were to lie in wait for the employer to come home. They anticipated that he would be carrying takings amounting to about £600. On the night of 15th-16th July 1977, Fernandez and one of his co-conspirators purchased some sticky tape. Fernandez made a hood from a pillowcase with holes cut for the eyes so that the employer would not recognise him. Later that night the conspirators met at the house of the employer, Mr Leigh, and succeeded in opening a window. They carried with them knives, rope and the tape. A cassette player, radio and silver lighter were removed from the window sill to facilitate entry, and those items were later found in the house of one of the conspirators. They were, however, disturbed by neighbours, who saw lights on, and they left, intending to return later. Fortunately for justice, a police patrol car saw Fernandez walking around, and as a result of their stopping and questioning him the plot came to light.

Fernandez has not got a clean record in this country but all his offences to date have kept him out of prison, although in 1977, as we

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have already recounted, he received a suspended sentence for driving while disqualified. His appearance before the courts started in 1972 with two offences, one of attempted deception and the other of theft. Later that year he was convicted of assault occasioning actual bodily harm. Three years later he was again convicted of assault occasioning actual bodily harm. Then he had a few comparatively minor motoring offences. His record is not good. On the other hand, it cannot be said that he has shown by his record that he is a member of the criminal class in this country. He seems generally to be a hard-working man. His family situation is as follows. He has a Spanish wife who came to this country about ten years ago. She is a devoted wife. They have two children, the elder of whom is now nine, both born in this country. They are buying their own house, which is in their joint names. Spanish is the language of the home, but, although the children can understand Spanish and can say a few sentences in that language, they are more English-speaking than Spanish-speaking; and, of course, they go to English schools.

We are satisfied, having heard Mrs Fernandez, that, if the recommendation for deportation is accepted and if her husband is sent back to Spain, she is going to face a grave dilemma. She feels as a wife that she ought to go back with her husband, but as a mother she feels that she ought to stay in England with her children because she is convinced that there is a better future for them here than there would be in Spain. Clearly she and the children will suffer hardship. On the other hand, if the only matter which the court should take into consideration is the crime and the circumstances of the crime which Fernandez himself committed, then there are indications that there should be a recommendation for deportation.

It is against that background of facts that we come to consider the principles which should be applied in this class of case. The leading authority is *R v. Caird* (1). The facts are irrelevant for the purposes of this judgment; we refer to it because a recommendation for deportation had been made in that case, and the court, which was presided over by Sachs, L.J., set out the principles which should apply:

'So far as Bodea, however, is concerned, there was also a recommendation for deportation. In a case such as is under consideration the question for the court is whether the potential detriment to this country of Bodea remaining here has been shown to be such as to justify the recommendation. This court is of the clear opinion that upon that basis the recommendation based on this particular isolated offence cannot be supported and should be cancelled.'

As we are referring to this case I go on to read the paragraph following which is relevant to a matter which arises in the case of the appellant Nazari:

'It desires to emphasise that the courts when considering a

recommendation for deportation are normally concerned simply with the crime committed and the individual's past record and the question as to what is their effect on the question of potential detriment just mentioned. It does not embark, and indeed is in no position to embark, upon the issue as to what is likely to be his life if he goes back to the country of his origin. That is a matter for the Home Secretary.'

It is relevant to point out that the power of a court to make a recommendation for deportation is derived from s. 6 of the Immigration Act, 1971, which reads:

'(1) Where under s. 3(6) above a person convicted of an offence is liable to deportation on the recommendation of a court, he may be recommended for deportation by any court having power to sentence him for the offence unless the court commits him to be sentenced or further dealt with for that offence by another court ...'

'(2) A court shall not recommend a person for deportation unless he has been given not less than seven days notice in writing stating that a person is not liable to deportation if he is patriotic, describing the persons who are patriotic and stating (so far as material) the effect of s. 3(8) above and s. 7 below ...'

Then there are other matters relating to adjournments and the like.

In our judgment it is clear that Parliament in 1971 intended that there should be full inquiry into a case before any order recommending deportation is made. A person who is likely to be the subject of an order must be given seven clear days' notice of what may happen to him. The object of that is to enable him to prepare his answer to a suggestion that he should be recommended for deportation. It follows that no court should make an order recommending deportation without full inquiry into all the circumstances. It should not be done, as has sometimes happened in the past, by adding a sentence as if by an after-thought at the end of observations about any sentence of imprisonment. It would be advisable for judges to invite counsel to address them specifically on the possibility of a recommendation for deportation being made.

We now indicate some guidelines which courts should keep in mind when considering whether to make an order recommending deportation. But we stress that these are guidelines, not rigid rules. There may well be considerations which take a particular case out of the guidelines; that is a matter which will depend on the evidence.

First, the court must consider, as was said by Sachs, L.J., in *R v. Caird* (1), whether the accused's continued presence in the United Kingdom is to its detriment. This country has no use for criminals of other nationalities, particularly if they have committed serious crimes or have long criminal records. That is self-evident. The more serious the crime and the longer the record the more obvious it is that

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there should be an order recommending deportation. On the other hand, a minor offence would not merit an order recommending deportation. In the Greater London area, for example, shoplifting is an offence which is frequently committed by visitors to this country. Normally an arrest for shoplifting followed by conviction, even if there were more than one offence being dealt with, would not merit a recommendation for deportation. But a series of shoplifting offences on different occasions may justify a recommendation for deportation. Even a first offence of shoplifting might merit a recommendation if the offender were a member of a gang carrying out a planned raid on a departmental store.

Second, the courts are not concerned with the political systems which operate in other countries. They may be harsh; they may be soft; they may be oppressive; they may be the quintessence of democracy. The court has no knowledge of those matters over and above that which is common knowledge, and that may be wrong. In our judgment it would be undesirable for this court or any other court to express views about regimes which exist outside the United Kingdom of Great Britain and Northern Ireland. It is for the Home Secretary to decide in each case whether an offender's return to his country of origin would have consequences which would make his compulsory return unduly harsh. The Home Secretary has opportunities of informing himself about what is happening in other countries which the courts do not have. The sort of argument which was put up in Nazari's case is one which we did not find attractive. It may well be that the regime in Iran at the present time is likely to be unfavourable from his point of view. Whether and how long it will continue to be so we do not know. Whether it will be so by the end of this man's sentence of imprisonment must be a matter of speculation. When the time comes for him to be released from prison the Home Secretary, we are sure, will bear in mind the very matters which we have been urged to consider, namely whether it would be unduly harsh to send him back to his country of origin.

The next matter to which we invite attention by way of guidelines is the effect that an order recommending deportation will have on others who are not before the court and who are innocent persons. This court and all other courts would have no wish to break up families or impose hardship on innocent people. The case of Fernandez illustrates this very clearly indeed. Mrs Fernandez is an admirable person, a good wife and mother, and a credit to herself and someone whom most of us would want to have in this country. As we have already indicated, if her husband is deported she will have a heartrending choice to make — whether she should go with her husband or leave him and look after the interests of the children. That is the kind of situation which should be considered very carefully before a recommendation for deportation is made.

We have considered the case of Fernandez in the light of those considerations and have come to the conclusion that the recommendation for deportation should be quashed. We can see no reason for interfering with the sentences of imprisonment. We had to grant him leave to appeal in order to quash the recommendation for deportation. He may if he so wishes exercise his statutory right to be present, but

we hold out no hope that it will do him any good; and we should be grateful if his wife would make that clear to him.

That concludes all the cases except to say a word in relation to deportation in the case of Dissanayake. He wants to go back to Sri Lanka, but says that he does not want to go back under an order of deportation. It is possible in his case (we make no finding about it) that, even if we were to quash the recommendation for deportation, the Secretary of State, under the powers which he has under the 1971 Act, could deport him in any case, because apparently his stay here is subject to the limitations which were imposed on him when he first came to this country. His wife, whom it is said he married for reasons of convenience, is now dead; but that is not a matter into which we intend to go. It is often said in this class of case that there is no need to recommend deportation, because the accused is willing to go back of his own free will when he has served his sentence of imprisonment. We are not impressed with that argument. Assertions of intention made in this court are often forgotten on leaving the court and even more frequently forgotten once the prison gates have opened and the appellant is at large once again.

In our judgment there were very good grounds in the case of Dissanayake for making a recommendation. He had committed a serious offence, and he committed it, according to the case put forward on his behalf, when he was in a state of diminished responsibility by reason of what in his case must be inherent causes. Where there is evidence of mental instability connected with or resulting in the commission of a serious criminal offence it seems to us, again as a matter of guidelines, that that in itself is a good reason why a recommendation for deportation should be made. Whether it is carried out is entirely a matter for the Home Secretary.

We wish to state clearly and firmly that all a court does when it makes a recommendation for deportation is to indicate to the Secretary of State that in the opinion of the court it is to the detriment of this country that the accused should remain here. The final decision is for the Secretary of State. No doubt he will take into account the personal circumstances of each person whose case he is considering, and that will include the political situation in the country to which he will have to go if an order of deportation is made. These are matters solely for the Secretary of State, and not for the courts.

It follows from what we have said that in the case of Nazari the application will be dismissed. The appeal will be dismissed in all its aspects in the case of Dissanayake. In the case of Anyanwu there is now no appeal before the court; but if there had been one we should have upheld the recommendation because he was proved to have been an illegal immigrant. In such cases a recommendation should normally be made. In the case of Fernandez, as has already been indicated, the order recommending deportation will be quashed.

Orders accordingly.

Solicitors: *Offenbach & Co; Philip Kossoff & Co; Stuart A West & Co;*
Treasury Solicitor.

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Reported by G.F.L. Bridgman, Esq., Barrister.

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COURT OF APPEAL
(Lawton, L.J., Chapman, J., and Boreham, J.)

September 1, 1980

ATTORNEY-GENERAL'S REFERENCE (NO.5 OF 1980).

i *Obscene Publication — Obscene display of images on screen — Images derived from video tape — Obscene Publications Act, 1959, s.1 (2), (3).*

ii Three persons and a company were charged with publishing an obscene article contrary to s.2 of the Obscene Publications Act, 1959, the display not being a conventional film show, but being derived from video cassettes. At the end of the case for the Crown in the Crown Court the judge directed the jury to return a verdict of Not Guilty with regard as to all the defendants on the ground that a video cassette was not an "article" within s.1(2) of the Act of 1959. On a reference of the case to the Court of Appeal by the Attorney-General,

Held: the words of s.1(2) and (3) of the Act were apt to cover video cassettes; the object of sub-s.2 was to bring all articles which produced words, pictures, or sounds within the embrace of the Act with only two exceptions; the answer posed by the Attorney-General, therefore, was that a person who provided an obscene display on a screen published an obscene article contrary to s.2 of the Act of 1959.

iii Reference by the Attorney-General.

D. Tudor Price for the Attorney-General
S. Shields Q.C., and G. Robertson for the respondents.

Lawton, L.J.

LAWTON, L.J., delivered the following judgment of the court: In this matter the Attorney-General, acting under s.36 of the Criminal Justice Act, 1972, has asked this court to give its opinion on the following point of law:

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'Does a person who provides an obscene display of images on a screen to persons who are likely to be depraved or corrupted by that display publish an obscene article contrary to s.2 of the Obscene Publications Act, 1959, in a case where the images are derived from video tape?'

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The material facts which give rise to this reference are as follows. Police officers in possession of a warrant to search premises issued under the 1959 Act visited basement premises in London. These premises were set out as two small cinemas to which persons were admitted on payment of money. In each of the cinemas obscene displays with sound, indistinguishable to the watcher from conventional film shows, were being shown on screens to audiences who were present. Three persons admitted responsibility for these activities and admissions of responsibility for the shows were made on behalf of the company which received the profits thereof. The displays were not conventional film shows but were derived from video cassettes. A video cassette contains video tape. When a video tape is played electric signals from it

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are fed by way of cable to a conventional television receiver containing a cathode ray display tube. This display tube within the display screen provides the means by which the images derived from the video tape are displayed on screen. The electric signals are fired down the display tube to produce the images. The system used in this case did not involve the projection of light on to a screen. The light to provide the images was emitted from the cathode ray display tube. The indictment charged three persons and a company with publishing an obscene article, namely, a video cassette, contrary to s.2 of the 1959 Act, at a date prior to the coming into force of the provisions of s.53 of the Criminal Law Act, 1977.

At the end of the case for the Crown the judge (his Honour Judge Lewisohn) directed the jury to return a verdict of not guilty against all the defendants on the ground that a video cassette was not an obscene 'article' as defined by s.1(2) of the 1959 Act. The words 'any film or other record of a picture or pictures' should be construed *eiusdem generis* and a video tape was not of the same genus as a film. Secondly, that because the process by which a video tape was made in the first instance included the projection of light, the showing of a video tape was a cinematograph exhibition, and therefore exempted from the provisions of s.1(3)(b) of the Act by the relevant words of the proviso to the subsection which were in force at the time of the offence charged. Thirdly, in the alternative, because the Crown expert had agreed that the process of display could be described as 'television', that the display was one shown in the course of television and was therefore exempted by that part of the proviso to s.1(3)(b) which was then and is now in force.

The judge, as I have indicated, ruled in favour of the defence submission on the first point. As to the second submission, he ruled that if the evidence at the end of the case showed merely that the video tape was initially recorded by means of the projection of light, then its showing would not be a cinematograph exhibition. But the judge stated that he would have left as a question of fact for the jury to determine whether the process of showing it did include the projection of light so as to make it a cinematograph exhibition. Thirdly, he ruled that even if the process of showing the video cassette was something done in the course of television, its showing to an audience in one set of premises did not amount to broadcasting so as to bring the activity within the exemption conferred by the proviso to s.1(3)(b) of the 1959 Act.

We have not been concerned with the second submission made to the judge. Whether the judge was right or wrong on the evidence which was before him is of no interest now because, as a result of the provisions of s.53 of the Criminal Law Act, 1977, that which took place, even if it had been a cinematograph exhibition, would now be an unlawful publication of an obscene article. As to the third submission, counsel for the Attorney-General has been content that the law should be as the trial judge ruled it was and he has not asked us to deal with the element of television. Counsel has said on behalf of the first two respondents to this reference that whether a particular display via a video cassette was or was not a television broadcast would depend on the evidence. He has not asked us to deal with the third of the submissions made to the judge.

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It follows, therefore, that the sole issue before us has been whether a video cassette is an "article" within the definition of an obscene article in s.1(2) of the 1959 Act. In so far as that Act provides a definition of an obscene article it has not been affected by subsequent legislation amending the 1959 Act, but nevertheless, because of a point taken by counsel for the first two respondents, it may be necessary to look at some of the amending legislation.

Counsel for the Attorney-General puts his submission succinctly. He says that s.1(2) was intended to embrace any article whatsoever that could be used to show images. This, he submitted, was demonstrated by the words of sub-s (2) itself and by the wide terms of s.1(3)(b). The definition of an 'article' contained in s.1(2) is as follows:

'In this Act "article" means any description of article containing or embodying matter to be read or looked at or both, any sound record, and any film or other record of a picture or pictures.'

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Subsection (3), in its relevant parts, is as follows:

'For the purposes of this Act a person publishes an article who ...
(b) in the case of an article containing or embodying matter to be looked at or a record, shows, plays or projects it ...'

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There then follow two provisos, one relating to a cinematograph exhibition and the other to television or sound broadcasting.

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Counsel for the Attorney-General submitted that the wide words of sub-s (2) indicate that any article which brought about the reproduction of an obscene image was within the contemplation of the Act and that the only kinds of reproduction of obscene images which were outside the Act were the two exemptions set out in the provisos. He went on to point out that in sub-s (3) publication embraces a person who publishes an article containing or embodying matter to be looked at, or a record, shows, plays or projects it. He went on to remind the court that in sub-s (2) the word 'record' occurs twice. On one occasion it has the adjective 'sound' in front of it and in the other case the adjectival phrase 'any film or other' comes before the word 'record'. It followed, so submitted counsel for the Attorney-General, that an accused publishes an obscene article if it is in the form of a record and he shows, plays or projects it. The record may be either of sound or of pictures. A video tape does in fact constitute a record of pictures, albeit that it is a record which is made up of electrical impulses recorded on a video tape. As neither of the exemptions apply, so says counsel, it follows that a video cassette, being a record of pictures, does constitute an article within the meaning of s.1(2). As in this case there was clearly a publication of the video cassette, it follows that the judge ought not to have ruled as he did.

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To that submission counsel for the first two respondents, whose argument has been adopted by counsel on behalf of the other respondents, has made the following answer. He has reminded the court that in 1959, when the Obscene Publications Act was passed, video tapes had not got much beyond the experimental stage. They were probably used by broadcasting bodies (such as the British Broadcasting Corpor-





ation) but they were not on sale to the public as they are now. It follows, he says, that it is inconceivable that Parliament had video tapes in mind when it was deciding what articles should come within the description 'obscene articles' for the purposes of the 1959 Act. He says that this court should be slow to apply the words to a piece of electronic equipment which probably had not been within the contemplation of Parliament. We have kept in mind that particular admonition made by counsel, but if the clear words of the statute are sufficiently wide to cover the kind of electronic device with which we are concerned in this case the fact that that particular form of electronic device was not in the contemplation of Parliament in 1959 is an immaterial consideration. In any event in 1959 Parliament would almost certainly have had in mind the fact that electronic equipment for reproducing words and pictures was something likely to come about in the near future. In those circumstances it is not improbable that words were chosen which were wide enough to embrace any developments in the electronic field. But speculation as to what Parliament had in mind and what it probably had not got in mind is neither here nor there. It is the duty of this court to consider the wording of the Act and to construe the words in it (if they are words of ordinary English usage) in the way in which they would have been understood by ordinary literate persons at the material time, namely, 1959.

Counsel for the first two respondents has submitted that, even when that test is applied, the words are not apt to embrace what happens when a video cassette is played. He points out that sub-s (2) embraces three different situations. One is an 'article containing or embodying matter to be read or looked at or both', secondly, a 'sound record', and, thirdly, 'any film or other record of a picture or pictures'. He did not seek to say (as counsel who appeared on behalf of his client at the trial sought to do) that the *eiusdem generis* rule applied. The judge thought it did. He put the matter in this way in his ruling:

Does a video cassette fall within the words "or other record of a picture or pictures"? Let me start this consideration by saying that I accept the submission that these words form part of one phrase or division, starting with the words "any film". Therefore the other record of picture has to have some kinship with film.'

He was wrong in that approach because what he had to do was to construe the words 'film or any other record' in the context of sub-s (2). It is clear that sub-s (2) embraced a number of articles, starting with those which contained or embodied obscene matter, those which were in the form of a soundtrack and those which were a film or other record of pictures. The judge did not have the advantage of having cited to him the decision of the Divisional Court in *Derrick v. Customs and Excise Comrs* (1). Had he had the benefit of having that decision referred to him, he would have appreciated that he had to look at the subsection as a whole and not to pick out any particular group of words in the

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subsection. But the fact that he was mistaken in applying the *eiusdem generis* rule does not mean that there is not force in what counsel for the first two respondents has submitted to this court, because his submission has proceeded as follows. There being three types of article, each of them was dealt with, so he submits, specifically in sub-s (3)(b). That, he says, is shown by the way in which that paragraph is worded, because under it

'a person publishes an article who ... (b) in the case of an article containing or embodying matter to be looked at [that is the first category of obscene article] or a record [which could cover both the second and third categories], shows, plays or projects it.'

Counsel submitted that a video cassette shows nothing. Anyone looking at it merely sees a piece of magnetised tape. There is nothing on that tape to indicate the presence of electrical impulses and certainly nothing on the tape to show pictures. So, as he submits, the word 'shows' is inapplicable. He went on to submit that the word 'plays', bearing in mind the year in which this statute was passed (1959) clearly applied to a sound record mentioned in sub-s (2). A video tape is not played in any sort of way that a sound record would have been played in 1959. For myself I am not all that certain of that because in 1959 there were many tape recorders and, in ordinary English, those who used tape recorders play them. But be that as it may, assuming for the moment that the word 'plays' is inappropriate to a video cassette, counsel went on to submit that the word 'projects' is inapplicable to a video cassette. He submitted, again bearing in mind that the statute was passed in 1959, that the word 'projects' envisaged the kind of projection which there is for films, namely, by projecting light behind the film and producing an image on a screen. That, he submitted, was not a concept which could be applicable to a video cassette.

He went on to point out that if video cassettes were to be distinguished from films (and he was submitting that the words 'other record of a picture or pictures' meant something in the nature of a film, if not a film) then anomalies would arise in the administration of the law relating to obscene publications. Those anomalies come about (so counsel submitted) in this way. After 1959, as is common knowledge, video cassettes became freely available to the public and in recent years they have been the vehicle for the publication of obscene pictures. The 1959 Act, as I have already said, exempted cinematograph exhibitions from its application. Counsel for the Attorney-General has told us (and we accept) that the reason was that in 1959 it was thought that the controls which existed under the Cinematograph Acts, 1909 and 1952, together with the existence of the British Board of Film Censors, provided adequate protection to the public from the showing of obscene films in what, for want of a better term, I am going to call the commercial cinema. But for various reasons, with which we are not concerned, that protection turned out to be inadequate. As a result a difficulty arose (some might describe it as a nuisance) as a result of private persons prosecuting the owners of commercial cinemas for publishing obscene films. It was thought that this was undesirable. As a result, by s.53 of the Criminal Law Act, 1977, which in its material

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part came into operation on 1st December, 1977, no prosecution of anyone for showing films in commercial cinemas could be undertaken without the consent of the Director of Public Prosecutions.

The way the provision was enacted was this (I quote from s.53(2) of the Criminal Law Act, 1977):

'In s.2 of that Act [that is the 1959 Act] at the end of subs. (3) there shall be inserted the following subsection: "(3A) Proceedings for an offence under this section shall not be instituted except by or with the consent of the Director of Public Prosecutions in any case where the article in question is a moving picture film of width of not less than sixteen millimetres ...".'

Commercial films are always of not less than 16 mm. It follows, said counsel for the first two respondents, that, although the consent of the Director is required for a prosecution in respect of the showing of indecent films of a size of 16 mm and over, it would not be required for the showing in cinemas of video cassettes. The consequence would be that private prosecutions could be started in respect of such shows, although, had they been on 16 mm film in commercial cinemas, they could not have been shown. There is a difference there.

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The next difference arises in this way. Under s.4 of the 1959 Act, there was a defence of public good. That defence was in these terms:

'(1) A person shall not be convicted of an offence against s.2 of this Act ... if it is proved that publication of the article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern ...'

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In 1968 Parliament decided to free theatres from the control of the Lord Chamberlain. That was done by the Theatres Act, 1968. Section 3 of that Act provided as follows:

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'(1) A person shall not be convicted of an offence under s.2 of this Act if it is proved that the giving of the performance in question was justified as being for the public good on the ground that it was in interests of drama, opera, ballet or any other art, or of literature or learning ...'

When Parliament decided to amend the 1959 Act in relation to (I use a wide term) the interests of the commercial cinema, it provided by s.53(6) of the 1977 Act that there should be no prosecution of such a performance in a commercial cinema

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'if it is proved that publication of the film or soundtrack is justified as being for the public good on the ground that it is in the interests of drama, opera, ballet or any other art, or of literature or learning.'

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In other words, in relation to films, there was to be the same test of public good as there was in relation to the theatre. But that test was

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in different words from the general defence of public good provided by s.4 of the 1959 Act.

It followed, submitted counsel for the first two respondents, that if there was a showing in a commercial cinema of a film which was alleged to be obscene the test would be different from that which there would be if there was a showing by means of a video cassette in a cinema of the type found to exist in this case. There is something in that argument, but not much. It seems to us that what the Theatres Act, 1968, and the Criminal Law Act, 1977, were doing was making it clear what the word 'art' in s.4 of the 1959 Act embraced, namely, drama, opera and ballet. That, in our judgment, is shown by the use of the additional words 'or any other art'. Quite clearly Parliament regarded drama, opera and ballet as being a form of art. It would have been surprising if they had not taken that view. So, although there is a very slight difference between the tests to be applied in the different cases, in our judgment, it is not sufficient to make any difference to the construction of sub-s (2) and (3) of s.1.

The basic question is whether there is any substance in the submission of counsel for the first two respondents that the words in sub-s (2) and (3) are not apt to cover a video cassette. In our judgment they are. As counsel for the Attorney-General rightly submitted, the object of sub-s (2) was to bring all articles which produced words or pictures or sounds within the embrace of the Act. There were to be only two exceptions.

In our judgment the words 'shows, plays or projects' in sub-s (3)(b) are sufficiently wide to cover what happens when pictures are produced by way of a video cassette. It may be that counsel for the first two respondents was right in his submission that the word 'show', in the context of sub-s (3)(b), implies looking at, but the words 'play or project' cover, in our judgment, what happens when a video tape is used in such a way as to produce pictures. As I have already indicated in ordinary parlance (this would have been the same in 1959 as it is today) when a tape recorder is used it is talked about as being played. We see no reason why the same sort of language should not apply to a video cassette which produces not sound but pictures. Even if that is not right (and we think it is right) the word 'project' would be apt to cover what happens when a video cassette is brought into use, because what is happening is that the electrical impulses recorded on the video tape are thrown on to the television screen by means of the use of an electric current. In ordinary parlance, they are projected on to the television screen.

Accordingly we find that the question posed to us by the Attorney-General in this reference is to the effect that a video cassette is an article within the meaning of s.1(2) of the 1959 Act.

Order accordingly

Solicitors: *Director of Public Prosecutions; Cowan, Lipson, Rumney.*

Reported by G.F.L. Bridgman, Esq., Barrister.

FAMILY DIVISION
(Sir J. Arnold, P., and Butler-Sloss, J.)
January 28, 1981

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W. v. SUNDERLAND BOROUGH COUNCIL

*Child – Care – Resolution by local authority – Objection by mother –
Hearing by justices – Social officer seen by justices in private –
Disputable evidence to be given by social officer.*

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A local authority passed a resolution under s. 2 of the Children Act, 1948, as substituted by s. 57 of the Children Act, 1957, vesting in the authority the parental rights and duties in respect of a child. The mother of the child served a counter notice and the matter was referred to the juvenile court. When the case came on for hearing the mother was informed that the magistrates had expressed a desire to see the child, and in fact they did see her with her foster parents and also the social officer of the local authority who was the only important witness for the local authority. In due course the justices decided that the resolution should stand. On appeal by the mother,

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Held: there was nothing to suggest that anything was said by the foster parents or the social officer which could have had any effect on the minds of the magistrates, but it could not be right in any imaginable circumstances that where, as here, an issue arose of a potential disputatious character as regards the facts of a case the justices should be closeted with a person who was going to give disputable evidence regarding it. In view of what had occurred the decision come to by the justices could not stand.

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*Child – Care – Assumption by local authority of parental rights and
duties – Parent consistently failing to discharge obligations of parent
– Children Act, 1948, as substituted by s. 57 of Children Act, 1975.*

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By s. 2 of the Children Act, 1948, as substituted by s. 57 of the Children Act, 1975, a local authority may resolve that there should vest in them the parental rights and duties with respect to a child where a parent has so consistently failed without reasonable cause to discharge the obligations of a parent to be unfit to have the care of the child.

Held: the consistency referred to in the section has to be demonstrated only by reference to such period of time as is appropriate to the matters which arise in the particular case.

Appeal by the mother of a child against an order made by Sunderland Juvenile Court.

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*R Lamb for the mother.
A Brunner for the local authority.*

SIR JOHN ARNOLD, P.: On October 13, 1977, the appellant had a baby girl. On September 12, 1978, the Sunderland Metropolitan Borough Council ('the local authority') passed a resolution under s. 2 of the Children Act, 1948, as amended, vesting the parental rights and duties in respect of the child in it. A counter-notice was given under that section by the mother, whereupon the matter was referred to a juvenile court. The matter was listed for hearing on October 26, 1978. The local authority and the mother came to an arrangement which was

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designed to see whether a state of things could be brought about under which the local authority could feel able not to continue with the resolution but to facilitate the reunion of the mother and child, against the background that there would in the meantime be an intensive regime of access between mother and child to see whether that point could be brought about. That being so it was very sensibly decided to adjourn the court hearing indefinitely.

That was how the matter rested between September, 1978, and May 1, 1979. On May 1, 1979, there was a case conference among the officers of the local authority as a result of which it was determined at that level that the experiment had failed, and that it was no longer realistic to expect to bring into being a state of things in which the child could be, or should be, returned to the mother. It was decided that the resolution should be implemented by means of long-term fostering, in fact with the same foster parents who had had the child in the meantime, but in the new guise of would-be adopters. The new style of regime should be accompanied no longer by an intensive programme of access but by the more restrictive programme of three-weekly visits by the mother to the child. When this decision was indicated to the mother she determined to reinstate the juvenile court hearing on the question whether the resolution should stand. In due course that issue came before the court on October 4, 1979. On that occasion the justices decided that the resolution should stand. It is from that decision that the mother appeals to us today. That is the history of the litigation, and it now falls on us to consider whether that decision of the justices should stand or not.

The mother arrived at the juvenile court with her solicitor and a couple of women friends shortly before 10 o'clock on the morning of the hearing. At about the same time there were present in the court building the officer of the social services department of the local authority who had been in immediate charge of the case, Mr Jarvis, a superior officer, Mr and Mrs B who were the foster parents, and the child who was then almost exactly two years old. The mother was told by, I think, Mr Jarvis and his superior that the justices had expressed a desire to see the child and that the mother could see the child thereafter. That piece of information was passed by the mother to her solicitor and nothing more transpired except that some time later, between that event (which took place about 10.00 and 10.30 a.m. when the hearing started) an opportunity was given to the mother to see the child for a very short time. The case was then heard.

What had happened was this. The justices had seen the child in company with the foster parents, who, though interested parties, were not in fact witnesses, and Mr Jarvis, who was the only important witness for the local authority. There is no material before us to suggest for a moment that anything was said by the foster parents or by Mr Jarvis which could have had any effect on the minds of the justices. There is no reason to think that it was, certainly there is no material from which we could so judge. Nor is there any reason to suppose that it was necessary for the child to be accompanied either by Mr Jarvis or by Mr B. It is arguable, and for my part I would be happy to accept, that it was desirable that there should be somebody with the child in case she became distressed or nervous, but no reason at all that I can see

to think that it should have been anybody other than, or in addition to, Mrs B, the foster mother. At no time, until long after the decision of the justices had been made and announced, was it ever brought to the attention of the mother or her solicitors, or anybody else concerned with the case, that the justices had had with them before the hearing anybody other than the child. Certainly there was no reason whatever for anybody to suppose that they had had with them Mr Jarvis. But such was the fact.

To me it seems plain that in those circumstances, justice cannot have been seen to have been done. It cannot be right, in any imaginable circumstances, that where an issue arises of a potentially disputatious character as regards the facts (and if ever there was one it was this one) that the justices should be closeted, for whatever reason, with the very person who is going to give the disputable evidence about the matter. It is in fact the case, as has been said in this court in *Re T* (1) that there is no rule of law which empowers justices to see children in their private room. But it does not necessarily follow that in any case in which they did do so that circumstance alone would be sufficient to upset their decision. However that may be, that is not this case. This case is one in which, quite plainly, in view of what happened and what I have described this decision cannot stand.

We were told by counsel for the local authority, on instructions (and the local authority must be much concerned with appearances in that court) that it was the practice in the juvenile court of the Sunderland Bench always to see the social worker and the child in circumstances of this kind. I can only say that I regard that as a most unfortunate practice, at least in cases in which the social worker is liable to be called on to give potentially controversial evidence. If there be any very unusual circumstances in which it is imperative that such a course should be followed then what the justices ought to do is to indicate that this has occurred so that, at least, everybody in the court knows the fact. It would be very much better if it never happened again.

A conclusion that the decision cannot stand as it is does not, of course, mean that the opposite conclusion should necessarily be reached. It would be possible, if this court were not convinced that the material led to a conclusion that the resolution should lapse, merely to set aside the decision which has so far been made and to remit the case for another hearing before the justices. It is, therefore, necessary to go on to consider the submissions which are made by the mother as to the merits of the decision. When one looks at s. 2 of the Children Act, 1948, it is to be seen that there are in this case three matters which have to be decided. First of all, in order that the court should direct that the resolution should not lapse, it has, under s. 2(5), to be satisfied in the circumstances of this case that the mother had so consistently failed without reasonable cause to discharge the obligations of a parent as to be unfit to have the care of the child, on grounds which were already made out at the date of the passing of the resolution on September 12, 1978. Secondly, that there continued to be grounds on which that conclusion ought to be reached at the time of the hearing before the justices on October 4, 1979, and, finally, that it was in the interests of the

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child to direct that the resolution should not lapse. If the local authority failed to make out any one of those three, and the onus was squarely on them, then the only proper conclusion of the justices could have been that the resolution should lapse.

The history of the matter was this. The mother had had, prior to the birth, some psychiatric problems about which it is sufficient to say that on the medical evidence she was cured. Because of that history, the baby was placed initially, while the mother and baby were still in hospital, in the special baby care unit. On October 21, 1977, the mother was ready for her discharge. She could, on any medical grounds, have taken the child with her, but she did not. According to the evidence, she told the nurse in charge that she felt unable to cope with the baby at home at that stage. Exactly why this was so is not very clear; at that early stage it may very well be attributable to post-natal depression or perhaps to the lack of self-confidence which would, not surprisingly, be felt by a young woman who had had psychiatric troubles in the fairly recent past.

The mother, quite soon, acquiesced in the fostering of the child and, indeed, by the end of a month or so after the birth, the child was already placed with Mr and Mrs B at Consett for fostering. The mother was, at that time, minded that the child should be adopted. The result of that was that after a reception into care, on November 4, 1977, by the local authority, although it was made quite clear to the mother that she could see the child, she did not in fact do so until four months later when on March 3, 1978, the mother made an arrangement, quite independently, on her own account, to see the child and did so. That was, it seems, a surprise to the social worker, who was in touch with a body called the Hexham and Newcastle Diocesan Rescue Society who were expected to arrange any visit to the child. The local authority, through its appropriate officer, was minded to arrange for further visits. But only one visit after that (or perhaps two) in fact took place. So matters stood until August, 1978. In August, 1978, the mother gave the sort of intimation which amounts to a request under s. 1(3) of the 1948 Act for the return of the child to her. It was in those circumstances that the local authority passed its resolution on September 12, 1978.

The first question then is: Was there, on the part of the mother, such a failure to discharge the obligations of a parent as to be unfit to have the care of the child without showing any reasonable cause therefore? There is very little evidence as to exactly what it was which caused the contact between mother and child to be so minimal after March 3, 1978, up to the date in August 1978 when she asked for the child back, which undoubtedly took place. In the course of her evidence the mother suggested that access was refused, but certainly there is no indication that it was refused by the local authority; quite the reverse, they were offering to arrange it. And it seems to me, at any rate, that the justices were, on the material before them, fully entitled to take the view that that separation of mother and child for that long period of about six months was not explained in any way which should have led them to conclude that there was a reasonable cause for it. An unexplained absence of any visit to the child, or any significant visit to the child, over that period seems to me to be a matter which entitled the

justices, if they were so minded, to conclude that there was the sort of failure which is indicated in the relevant paragraph of the subsection. For my part I do not find it possible to say that the justices were wrong in thinking that the first matter had been made out.

The second matter relates to the period between the resolution of September 12, 1978, and the hearing a little over a year later on October 4, 1979. What had happened was that very soon after the resolution in September, 1978, some correspondence took place between the local authority and solicitors who were acting for the mother. The exact details of that have not been referred to, but the upshot, at no very great distance of time (not more than three weeks after the passing of the resolution), was that regular weekly visiting started, the first occasion being, apparently, October 3, 1978. The arrangements which had been made betokened twice-weekly visits. The visits which did take place from October 3, through to Christmas were, so far as appears from the evidence, absolutely regular one-weekly visits. It seems to me to be quite impossible to say that the difference between once-weekly and twice-weekly visits is a difference involving the sort of failure which is mentioned in s. 2(1)(b)(v) of the 1948 Act.

So matters fell until Christmas. On December 22, 1978, there was a telephone call between Mr Jarvis and the mother. Mr Jarvis was told by the mother that she had agreed with the foster mother to the child going to her parents' home the next week. This was vetoed by Mr Jarvis on the ground that he had not visited the parents' home to see whether it was suitable for the child. There was also, as Mr Jarvis pointed out, a difficulty in that there was a bad personal relationship between him and the mother's father, a matter about which we know nothing, and that that was an obstacle in the way of his inspecting the house. His language on oath is this: 'I said her father had been unwilling to let me visit home'. I suppose this should read 'the home'. He then, for the first time, told the mother that his department might have to make alternative plans if she did not respond to the child as she should, that the review on this matter was fixed for May, and that the alternative which he had in mind was long-term fostering. That warning, whatever it was based on, cannot have been based on any lack of regular visiting. Visiting had been regular and consistent from October 3, 1978. He also told her, which I suppose she knew, that the adjournment of the juvenile court proceedings had been agreed to by his department to let the reunion process start. Well, there is nothing controversial about that. He arranged for her to visit on January 2, 1979, and on January 5 she did visit, the visit on January 2 having been cancelled, according to Mr Jarvis because of blocked roads. She visited on January 5, 16 and 19, so there were three visits within the first 14 days. There was then a small gap, and on February 2 and 6, she visited. Again, after a gap of three weeks, she visited on February 27. She visited again on March 6, 9 and 13. She had been seen by Mr Jarvis on February 28 and he found her very worried and drawn, but she refused to elaborate on her anxieties.

In the meantime, on February 19, she had signed a tenancy agreement for a house. It was a house which was not situated in the part of Sunderland which she particularly favoured, where her church was situated, and where she was deriving, it seems, a good deal of support both from the clergy and the congregation. But on February 2 the local

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authority solicitor, in a letter which had obviously been written with the close collaboration of Mr Jarvis, who is freely quoted in it, had pointed out that there was this review coming up in May, that that review was liable to lead to a solution which would be unsatisfactory to the mother if at that stage no progress had been made towards the development of a situation in which she could have the child back, that an element in that was having appropriate accommodation, and that she would be very wise, therefore, to accept accommodation where she had been offered it, instead of insisting on accommodation in the favoured part of town. That was a sensible enough suggestion, and she was persuaded, no doubt, by that.

On February 19, as I have indicated, she obtained accommodation. It was a house which had been occupied by somebody else and was in need of both repair and replacement, that is to say, decorative repair and more substantial matters of which only two are known to the court. One drawer sink unit which had to be fitted and the other to some electrical work about which we know nothing.

The matter of the sink unit was slightly complicated in that although it was not technically necessary to delay fitting it until a top was available, according to the general foreman in the public works department, a lay person such as the mother might very well think that it was. Whether for that reason or for any other I do not know, but the fact of the matter is that it took very much longer than the period which the foreman considers is appropriate namely a period of not more than three weeks, to put the house to rights. At the hearing on October 4, 1979 the mother said it was almost redecorated by then. Mr Jarvis saw it on May 22, 1979 and it was curtained and wallpapered, and there were three chairs in the sitting room. He does not appear to have gone to any other room. There is no reason why he should. But it was a slow business, and this period after the acquisition to some extent coincided with the falling off in the visits between the mother and her child.

They did continue, as I have already indicated, up to March 13. Then there was a gap of five or six weeks from March 13, to April 24. On April 24, the mother visited the child again, but on the previous day she had had a meeting with Mr Jarvis at which they had discussed, in his office, the state of things in the new house. She told Mr Jarvis, according to his evidence, that everything was going well. She told him that she could not visit, or presumably had not been able to visit, the child as she had been busy. He reminded her of her duty to maintain contact with the child, and he said that the visits had fallen off rather than increased as the department had hoped. These comments seem to have been sufficiently cogent to persuade her to visit on the following day.

In the meantime, as indeed the mother knew, the case review had been arranged for May 1, which was a week away. She knew about it because, according to the evidence, on the occasion of the meeting on April 23 she had mentioned bringing a friend with her to attend the review. On May 1 it was decided that she had failed in her endeavour to bring about a state of things which would lead, or be likely to lead, to a reunion with her child. From that moment on that was abandoned. The three-weekly visit was substituted in conjunction with the long-term fostering project. So final was that departure that the justices did not consider it necessary at all to consider any question whether there

had been any failure in the duty indicated in s. 2(3) of the 1948 Act at any time after May 1, 1979. Not unreasonably, perhaps, but certainly, they regarded that as the watershed. They regarded the die as cast on that date.

The question that we have to consider under this head is whether the justices were entitled to regard the local authority as having discharged the onus, in respect of the period, theoretically between September 12, 1978, and October 4, 1979, practically, having regard to the way they set about their task, between September 12, 1978, and May 1, 1979, of demonstrating the failure concerned.

It has to be not only a consistent failure, but such a failure as to render the parent unfit to have the care of the child. Both those postulates have to be satisfied. The phrase is not the same as the phrase which is used in the adoption legislation (s. 12(2)(c) of the Children Act, 1975, which replaced s. 5(2) of the Adoption Act, 1958). It is pointed out in the case to which our attention has been directed (*M v Wigan Metropolitan Borough Council* (2), that there is a distinction between the use of the word 'persistently' in s. 12(2)(c) of the 1975 Act and the word 'consistently' used in s. 2 of the 1948 Act, which is the section which we have under consideration. The difference which is relevant, so far as this case is concerned, is that the period for a persistent failure has to be a substantially longer period, whereas in the section we are considering the consistency has to be demonstrated only by reference to such period of time as is appropriate to the matters which arise in the particular case.

Two aspects of failure are put forward by the local authority on this appeal. One is (though faintly comprehending the period between Christmas and the end of April, 1979) that there had been such gaps in the mother's visiting programme, such inadequacies of excuse, that the failure was made out in respect of that period on the basis, purely, of the failure to keep contact. The other is the failure between February 19 and May 1, 1979 to carry out expeditiously the maximum of three weeks' work, according to the foreman, which was required to render the house habitable so as to provide a place in which the mother could, if properly minded, discharge her duties to her child, by being able to take the child there if and when she had earned her right to do so by an effective reunion, by visiting the child.

Re D (3) was a case which required a consideration of whether there had been the persistent failure mentioned in the Adoption Act 1958. I do not think that on the question whether the failure was persistent or not I can derive any assistance in the present case, precisely because of the difference which is pointed out, as I have already mentioned, between a persistent failure and a consistent failure in the relevant context. What *Re D* (3) does show, in my view, is that this appellate court is entitled to review the justices' decision in such a matter, in order to see whether there was material on which the justices could reasonably have concluded that the failure had been demon-

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(2) [1979] 2 All E.R. 958; [1980] Fam. 36

(3) 138 J.P. 18; [1973] Fam. 209

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Having given the best consideration that I can to the present case, my conclusion is that there was not, between September 12, 1978, and May 1, 1979, or more relevantly between Christmas, 1978, and May 1, 1979, material on which the justices could reasonably conclude that the failure had been made out in terms of s. 2(1)(b)(v) of the 1948 Act. In my judgment, therefore, this court ought to reverse the justices' decision and direct that the resolution should lapse.

BUTLER-SLOSS, J.: I agree.

Appeal allowed

Solicitors: *Collyer-Bristow*, for *Goodswens*, Middlesbrough; *Sharpe, Pritchard & Co.*

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Reported by G.F.L. Bridgman, Esq., Barrister

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- (1) (1974), 118 Sol. Jo. 78
(3) 138 J.P. 18; [1973] Fam. 209

QUEEN'S BENCH DIVISION
(Donaldson, L.J. and Kilner Brown, J.).
December 11, 1980

Dorset Co Co
v.
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Division

DORSET COUNTY COUNCIL v GREENHAM

National Assistance — Accommodation for persons in need of care and attention — Charges for accommodation — Provision of accommodation by voluntary organisation — Payment of charges by local authority — Reimbursement by person for whom accommodation provided — National Assistance Act. 1948, s.26(3).

The respondent was a paraplegic and lived at a home conducted by a private organisation which provided accommodation for handicapped persons under contract with the D county council. Under s.26(3) of the National Assistance Act, 1948, a person for whom accommodation was provided under such an arrangement might in lieu of paying therefor under s.22 of the Act refund to the local authority any payments made by the authority on his behalf. Two scales of charges were made by the organisation and the medical officer there said that in view of the standard of care which the respondent needed he should pay at the higher rate, but no evidence of his findings was given before the magistrates who dismissed a complaint by the local authority that the respondent had failed to pay them the charges which were due to them. The authority said that under their contract with the organisation it was left entirely to the organisation to decide the appropriate charge in respect of any resident, and the authority had no right to challenge that figure, they had paid it in respect of the respondent, and they were entitled to reimbursement by the respondent. On appeal by the local authority,

Held: section 26 (3) of the Act of 1948 was not to be construed as meaning that however wrong or improvident an agreement was made by a local authority a resident had to reimburse them under the subsection; the words "any payments properly made in respect of him" must be read into the subsection; in the present case as the respondent challenged the propriety of the payment made by the authority and the authority tendered no evidence to justify it, the appeal would be dismissed.

Case Stated by justices sitting at Andover.

Miss F. Baron for the appellants, the Dorset County Council.
M. Dineen for the respondent, Clifford Crosby Greenham.

DONALDSON, L.J.: This is an appeal by the Dorset County Council by Case Stated in respect of a decision of justices for Hampshire sitting at Andover who dismissed a complaint by the county council that Mr. Clifford Greenham, the respondent, had failed to pay certain charges due under the National Assistance Act, 1948. That is in fact an over-simplification because they did find that in one small respect he had under-paid and ordered him to pay. But the major clash between the parties here is whether the respondent is obliged to pay for services provided to him at the rate of £20.35 a week or at £65.80 a week.

We understand, although it is not stated in the Case, that the respondent is a paraplegic, and he lives at Phipps House, Enham Alamein, near Andover, in Hampshire. Phipps House is a home conducted by an organisation known as Enham Village Centre Limited, a private

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organisation which provides accommodation for the handicapped and, it may be for, those who are suffering from disabilities due to old age. It provides accommodation and services under contracts with the Dorset County Council. The National Assistance Act, 1948, as amended, enables, and indeed requires, a local authority to provide such accommodation. It may do so itself, or it may do so under contract with another local authority or under contract with a private organisation. It is the latter option which this corporation has accepted. Under s.26 (3) of the National Assistance Act, 1948, a person for whom accommodation is provided under any such arrangement shall in lieu of being liable to make payment therefor in accordance with s.22 of this Act refund to the local authority any payments made in respect of him under the last foregoing subsection.

Against that background I turn to the findings of fact. There is a finding as I have already recited, that Mr. Greenham lives at Phipps House, Enham Alamein, and there is a finding that that accommodation is provided under an arrangement between the appellant and Enham Village Centre Limited by virtue of s.26 of the Act of 1948. It is found that a charge for the accommodation is levied upon the Dorset County Council in accordance with s.26 (2), and that there are two scales of charges at Enham, namely, £20.35 per week for accommodation and food and £65.80 per week for accommodation, food and extra medical care and services.

Apparently the medical officer at Enham made recommendations as to the standard of care which the respondent required, and in the light of those recommendations he was assessed at the higher rate of £65.80. When I say "he was assessed", what I think the magistrates mean is that Enham made an assessment of the charge to be levied on the Dorset County Council. Following that the Dorset County Council in fact paid Enham Village at that rate. The magistrates find that this is not a case in which the respondent is entitled to any reduction by reason of lack of means or anything of that sort. If he is liable at all, he is liable for the full appropriate rate. The Case goes on to find:

"The respondent did not take advantage of the extra medical care offered and there was no evidence before us that his medical condition was such as to require such extra medical care."

The magistrates' conclusion is expressed in the Case in the following terms:

"We were of the opinion that (a) the respondent's 'opinion' as to his medical condition and requirements were not matters which we should consider; (b) as we have heard no evidence of the medical officer's findings and conclusion whereby he formed his opinion that the respondent's medical condition required extra medical care, the assessment had not been proved; (c) we were bound to dismiss, and did dismiss, the first and second complaints. We found the third complaint proved as to the period of default only at the lower rate of £20.35 per week and ordered payment accordingly."

Against that background counsel for the Dorset County Council

says that this case is simplicity itself. She says that under the contract between the Dorset County Council and Enham Village it is left entirely to Enham Village to decide whether in respect of any resident the appropriate charge is £20 or £65. In this case Enham Village has levied a charge at the rate of £65, and Dorset County Council under that contract have no right whatever to challenge that figure, and they have paid it. I would only add, in parenthesis, that of all the improvident contracts to have made that, I would think, would take a great deal of beating if it really does so provide. However, that is said to be the basis of the claim. Counsel goes on to say that there is no relevant exception in s.26 (3). As the council has in fact made the payment, it is the respondent's liability to refund it and the magistrates' court has no jurisdiction to inquire into the matter.

I decline to construe s.26 (3) as reflecting an intention of Parliament that, whatever the figure and however wrongly a local authority may make payments for the provision of accommodation, the resident simply has to reimburse them under the section. Any ordinary principles of construction must involve putting in the words "any payments properly made in respect of him". It will, no doubt, be very rare that a patient or resident is able to challenge the propriety of payments by a local authority, but in this case the respondent chose to challenge the propriety of the payment and the local authority tendered absolutely no evidence to justify it. In those circumstances I am not surprised that the magistrates reached the conclusion that they did, and it was certainly one which was open to them. I would dismiss the appeal.

KILNER BROWN, J.: I agree.

Kilner Brown, J.

Appeal dismissed

Solicitors: *County Solicitors, Dorset County Council; Whitehead, Vizard, Venn & Lush, Andover.*

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Reported by G.F.L. Bridgman, Esq., Barrister.

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QUEEN'S BENCH DIVISION
(Lord Lane, C.J., and Webster, J.)
November 17, 1980

ANDERTON v. COOPER

Criminal Law – Offence – Charge – Information bad for duplicity – Single transaction covering period of time – Sexual Offences Act, 1956, s. 33.

i

By s. 33 of the Sexual Offences Act, 1956: "It is an offence for a person to keep a brothel, or to manage, or act or assist in the management of, a brothel". The respondent was acquitted, on the ground that the information preferred against her by the appellant was bad for duplicity, of an offence under s. 33 on an information which charged that she "on Friday, February 13, 1979, and other days between that date and Thursday March 15, 1979, did manage a brothel". On appeal by the prosecutor:

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Held: if an information charged a single continuing transaction taking place over a period of time to be completed it was not bad for duplicity; the material words in s. 33 "to keep" and "to manage" described a single continuing transaction which might cover a period of time; the inclusion of the words "other days" did not make the information bad for duplicity; and, therefore the information was not bad for that reason and the Case would be remitted to the justices to be heard by a fresh Bench.

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Case Stated by Rochdale, Greater Manchester, justices.

Lord Lane, C.J.

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LORD LANE, C.J.: This is an appeal by way of Case Stated from the justices for the Rochdale petty sessional division of Greater Manchester in respect of their adjudication as a magistrates' court at Rochdale on October 17 last year.

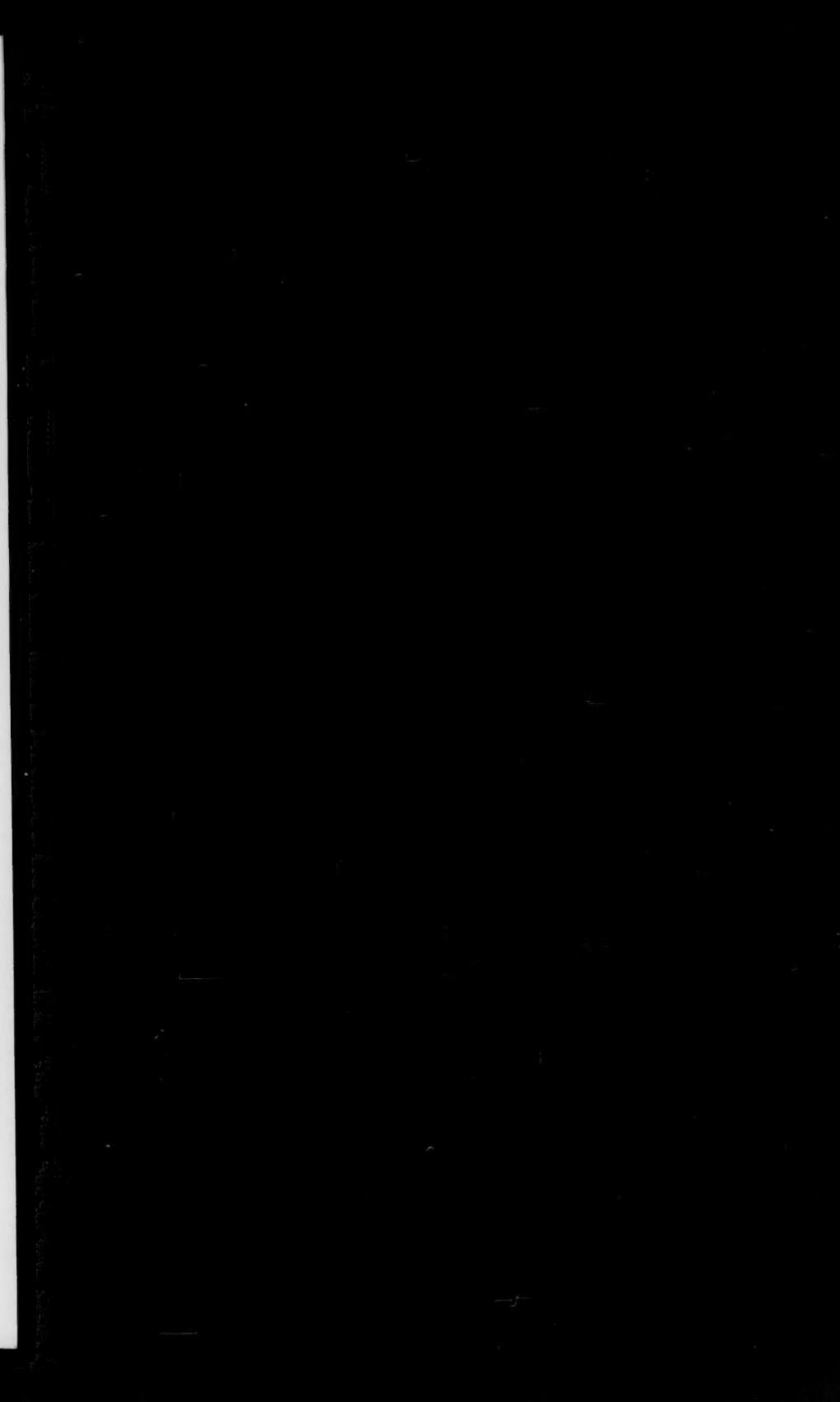
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The facts are these. On April 19, 1979, an information was preferred by the appellant against the respondent, Maureen Cooper, charging that she "on Friday February 13, 1979, and other days between that date and Thursday March 15, 1979, did manage a brothel at premises . . .", the details of which are unimportant. The justices began to hear the information on October 10, 1979, concluding the hearing, after adjournment, on October 17, 1979. They then set out in their Case the facts which – and there is no dispute as to this – plainly show that on various dates between February 13 and March 15, 1979, these premises were being used as a brothel and that the respondent, Maureen Cooper, was managing premises of that nature. The only basis on which this appeal is founded is that at some point in the trial – it is not quite clear at what point, but it was probably at the end of the case for the prosecution – a submission was made by defending counsel that the information was bad for duplicity.

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The justices pose this question to be answered by this court:

"The question for the opinion of the High Court is whether an information for an offence under s. 33 of the Sexual Offences Act,





1956, is bad for duplicity if it alleges incidents on, and on days, between, two specified dates and the evidence shows that the premises were being used for the purpose of prostitution on two or more distinct occasions within the time specified."

The justices came to the conclusion that the information was bad for duplicity; hence the hearing before this court. The difficulty which the justices found, and that is plain from the way in which they have dealt with the legal arguments in their Case, is raised by a decision of this court entitled *Parry v. Forest of Dean District Council* (1). The head-note in that case reads:

"In 1975 the respondent council preferred an information against the appellant that he had since January 8, 1972, used certain land in contravention of an enforcement notice dated November 8, 1971, made by the local planning authority. The justices convicted the appellant. On appeal by him, contending that the information had been bad for, inter alia, duplicity:

Held, allowing the appeal and quashing the conviction, that the information alleged a breach of the enforcement notice on every day since January 8, 1972; that, accordingly, it charged more than one offence and was bad for duplicity; and that the council's contention that it charged only one single continuing offence and that that could be done without rendering the information invalid failed."

The material part of the Town and Country Planning Act, 1971, relating to that case is s. 89, which reads, in so far as is material, as follows:

"(5) Where, by virtue of an enforcement notice, a use of land is required to be discontinued, or any conditions or limitations are required to be complied with in respect of a use of land or in respect of the carrying out of operations thereon, then if any person uses the land or causes or permits it to be used, or carries out those operations or causes or permits them to be carried out, in contravention of the notice, he shall be guilty of an offence, and shall be liable on summary conviction to a fine not exceeding £400, or on conviction on indictment to a fine; and if the use is continued after the conviction he shall be guilty of a further offence and liable on summary conviction to a fine not exceeding £50 for each day on which the use is so continued, or on conviction on indictment to a fine."

It will be seen that that enactment has two halves: the first half is the original breach of the enforcement notice which carries a penalty of its own, and if there is further continuance of the offence after conviction, a further type of penalty, namely £50 for each day on which the land is so used, is liable to be exacted. Turning to the judgment of the court, one finds that Lord Widgery, C.J., said:

(1) [1977] P & CR 209

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"The appellant contended that the information alleging his infringement of the enforcement notice was bad for a variety of reasons. The only reason which I feel disposed to deal with in this judgment this afternoon is the first. He contended, and in my judgment quite rightly, that this was a continuing offence alleged against him. He bases his argument in that regard on s. 89 of the Town and Country Planning Act, 1971, which creates this offence and creates and imposes a daily penalty for certain infringements. So, says Mr. Galpin on behalf of the appellant, the first point I make here is that this is a continuing offence and it is characteristic of a continuing offence that it repeats itself every day. In other words, a new offence is created each day. Accordingly, says Mr. Galpin, not only does the enforcement notice go beyond the six months period permitted by s. 104 of the Magistrates' Courts Act, 1952, but it also charges a very large number of offences in one information."

It seems to me, if I may say so respectfully, that throughout that case of *Parry*, and particularly if one reads the contentions of counsel who appeared on the other side, that there was a confusion in the use of the word "continuing". One side seems to have used the word "continuing" as meaning an offence which comprises one transaction taking place over a length of time, whereas the other side seems to have used the word "continuing" as meaning an offence which comprises a series of separate offences. Certainly, if a case is one which charges a series of separate offences in one information, it is bad for duplicity. If, on the other hand, it is one which charges one transaction, albeit taking place over a length of time, then, it seems to me, that cannot be an allegation which is bad for duplicity. In my judgment the case of *Parry* (1) is confined to the particular circumstances of the Town and Country Planning Act, 1971, and it certainly seems as though the learned Lord Chief Justice there, from the passage which I have read, was drawing strength from the fact that a fine of £50 might be imposed for each day of continued use after conviction. Whether that is justifiable or not is a matter we do not have to decide, but I derive very little assistance from that judgment which, in my judgment, applied simply to the type of charge which was laid in that case and does not necessarily deal with this type of case under the Sexual Offences Act 1956.

I turn now to the definition of the offence in s. 33 of the Sexual Offences Act, 1956, which reads as follows:

"It is an offence for a person to keep a brothel, or to manage, or act or assist in the management of, a brothel."

The material words are, first of all, "to keep", and, secondly, "to manage". It is very much a matter of first impression, but each of these words seems to me to describe a single transaction which may cover a long period of time, and if all that the information does is to charge a single transaction which has taken a period of time to complete, then the information is not bad for duplicity.

I return to the words of the information here:

"On Friday February 13, 1979, and other days between that date and Thursday March 15, 1979, did manage a brothel . . .".

In my judgment those words charge a single continuing transaction. It might have been better if the words "other days" had been omitted from the information, but the mere inclusion of those words cannot, in my judgment, make this charge bad for duplicity. This conclusion is supported by the specimen indictment contained in several editions of Archbold, including the most recent. We have had our attention also drawn to *Ex parte Burnby* (2). That case was not followed in *Parry v. Forest of Dean District Council* (1).

It is to be observed that there is one peculiar feature of the decision in *Parry* (1). A passage is cited therein from *Burnby* (2) as though it were part of the judgment in *Burnby*, whereas in fact it was a submission made by counsel appearing for the unsuccessful party. In any event it seems to me that *Burnby*, which deals precisely with a precursor of s. 33 of the Sexual Offences Act, namely, s. 15 of the Licensing Act, 1872, is much more help in this case than *Parry's* case (1). The head-note in *Burnby* reads:

"An information charged the defendant, a licensed victualler, with permitting his house to be used as a brothel on the days of January 26, 28, 29 and 31 and the days of February 1, 4, 5 and 6 in the same year, contrary to s. 15 of the Licensing Act, 1872:

Held, that the fact of the days named being non-consecutive did not prevent the charge from being a charge of one continuing offence; that the information was consequently not bad for duplicity; and that the defendant might on such an information be lawfully convicted of so permitting his house to be used on all the days named."

The very brief judgment of Ridley, J., runs as follows:

"I think that there is no foundation for this application. If this had been a charge of the commission of a separate offence on each of the days named in the information, no doubt the information and conviction would have been bad. But here the charge is of but one continuing offence. The rule must be refused."

In so far as that decision is on all fours with the facts of the present case, I am inclined to follow it. I take the view that on the facts of the present case and on the words of this information — those are the two important things to bear in mind — this information did not allege more than one offence, and, therefore, was not bad for duplicity. Consequently, I would allow this appeal and would remit this case to the justices to continue the hearing.

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(1) [1977] P & CR 209

(2) [1901] 2 KB 458

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WEBSTER, J.: I agree.

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Solicitors: *Chief Prosecuting Solicitor, Greater Manchester; Athertons, Oldham.*

Webster, J.

Reported by G.F.L. Bridgman, Esq., Barrister.

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R. v. Reading
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QUEEN'S BENCH DIVISION
(Donaldson, L.J., and McNeill, J.)
November 6, 1980

Queen's Bench
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R. v. READING CROWN COURT. EX PARTE MALIK

ii

Bail — Crown Court — Jurisdiction — Application to Crown Court after refusal of application by High Court — Courts Act, 1971, s.13 (4).

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The applicants were charged with criminal offences and under s. 5(6)(a) of the Bail Act, 1976, applied to the High Court for bail, which was refused. Subsequently they were committed to the Crown Court and they applied to that court for bail but the judge refused bail on the ground that under R.S.C., Ord. 79, r. 9(12), the applicants were not entitled to make a fresh application "to any other judge". The applicants applied for a judicial review of the Crown Court judge's decision.

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Held: the jurisdictions of the Crown Court and that of the High Court were distinct and different, and the Crown Court was not an "other court" within Ord. 79, r. 9(12); section 13(4) of the Courts Act, 1971, conferred power on the Crown Court to grant bail to any person who had been committed in custody for appearance before the Crown Court whereas the power of the High Court to grant bail existed both before and after committal.

Applications by Liaquat Ali Malik and Tarig Mohammed Malik for a judicial review of an order of Judge Blomefield at Reading Crown Court.

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Christopher Smith for the applicants.
The Crown was not represented.

Cur adv vult

Donaldson, L.J.

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6th November, 1980. DONALDSON, L.J., read the following judgment of the court: On 28th August, 1980, the applicants applied for bail to his Honour Judge Blomefield sitting at the Crown Court at Reading. The judge declined to entertain the applications holding that he had no jurisdiction. The applicants then applied to this court for judicial review. The matter would have been treated as one of urgency, but for the fact that within a short time of Judge Blome-

field's decision the applicants were tried, convicted and sentenced. We understand that a probation order was made in each case. Although the matter is thus of only academic interest to the applicants, the point taken by the judge is of general importance and we have, therefore, heard full argument and taken time to consider our judgment.

The background facts giving rise to these applications can be stated briefly. The applicants were arrested and charged with criminal offences. They were brought before the Windsor justices who on more than one occasion remanded them in custody. If the applicants were unrepresented on any of these occasions, the justices were bound by s. 5(6) of the Bail Act, 1976, to inform them that they might apply to the High Court for bail. That is what the applicants did. Their application by summons was heard by Peter Pain, J., in the High Court on 24th July, 1980. The police objected to bail on the grounds that there was still one prosecution witness to be interviewed and they feared that there might be interference with witnesses. These are grounds on which bail can properly be withheld in accordance with s. 4 of and para. 2 of sched. 1 to the 1976 Act. Pain, J., refused the application, saying that he was unable to grant bail 'until committal'. On 6th August, 1980, the applicants were committed to the Crown Court for trial. The justices declined to hear an application for bail on that occasion, holding that there had been no change of circumstances. In passing, we would have thought that there had been a very clear change of circumstances, namely, that the prosecution had by then completed its investigations and that the applicants had been committed for trial. Although there may be exceptional cases, as a general rule the moment of committal for trial must, in our judgment, be an occasion on which an accused person is entitled to have his right to bail fully reviewed. In any particular case, the eligibility of the accused for bail may or may not have improved, but it is almost inevitable that there will have been a change in circumstances. For example, the court will be in a much better position to assess 'the nature and seriousness of the offence . . .' (see para. 9(a) of sched. 1 to the 1976 Act). In addition the strength of the prosecution case can for the first time be fully assessed, both by the committing court and by the accused himself. This can be very material in considering the likelihood that the accused may 'fail to surrender to custody . . .' (see para. 2(a) of sched. 1 to the 1976 Act).

If an accused person is unrepresented when he is committed for trial, justices are obliged by s. 5(6)(a) of the 1976 Act to inform him that he may apply for bail to the High Court or to the Crown Court. Clearly this information was given to the applicants either by the justices or by their legal advisers and they in fact applied to the Crown Court.

The reason which Judge Blomefield gave for refusing to examine the merits of the applicant's claim to bail was that he considered himself deprived of jurisdiction by RSC Ord. 79, r. 9(12), which is in the following terms:

'If an applicant to the High Court in any criminal proceedings is refused bail by a judge in chambers, the applicant shall not be

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entitled to make a fresh application for bail to any other judge or to a Divisional Court.'

We assume that he read the words 'any other judge' as applying to him.

This decision, if correct, would make nonsense of s. 5(6)(a) of the 1976 Act. As we have pointed out, justices have a duty on committal to inform the unrepresented defendant of his right to apply for bail to the High Court or the Crown Court. But if the judge is right, there is no such right of application to the Crown Court if a previous application for bail had been refused by a judge of the High Court.

The jurisdictions of the Crown Court and of the High Court in respect of bail are distinct and different. Section 13(4) of the Courts Act, 1971, confers power on the Crown Court to grant bail in the following terms:

'The Crown Court may [grant bail to] any person — (a) who has been committed in custody for appearance before the Crown Court, or (b) who is in custody pursuant to a sentence imposed by a magistrates' court, and who has appealed to the Crown Court against his conviction or sentence, or (c) who is in the custody of the Crown Court pending the disposal of his case by the Crown Court, or (d) who, after the decision of his case by the Crown Court, has applied to the Crown Court for the statement of a Case for the High Court on that decision, or (e) who has applied to the High Court for an order of certiorari to remove proceedings in the Crown Court in his case into the High Court, or has applied to the High Court for leave to make such an application . . .'

Thus the jurisdiction of the Crown Court arises only after the magistrates have convicted and sentenced the accused who is appealing to the Crown Court, or after the magistrates have committed him to the Crown Court for trial or sentence, or after a voluntary bill of indictment has been preferred.

On the other hand, the power of the High Court to grant bail exists both before and after committal. It arises from its inherent jurisdiction and from s. 22(1) of the Criminal Justice Act, 1967, as amended, which provides:

'Where [a magistrates' court] withholds bail in criminal proceedings or imposes conditions in granting bail in criminal proceedings the High Court may grant bail or vary the conditions.'

Section 22(5) expressly preserves the inherent jurisdiction.

The judge's decision is also inconsistent with the provisions of r. 18(1) of the Crown Court Rules, 1971, as amended by the Crown Court (AMendment) Act Rules, 1978. Rule 18(1) provides:
No. 439. Rule 18(1) provides:

'Every person who makes an application to the Crown Court relating to bail shall inform the court of *any earlier application to the High Court or the Crown Court* relating to bail in the course of the same proceedings.'

We have emphasised the material words.

If the judge were right, the very fact that an application for bail is made to the Crown Court implies that no previous application has been made to the High Court and the reference to the High Court is otiose. Moreover, the rule contains no suggestion that a previous application to the High Court deprives the Crown Court of jurisdiction. Indeed, it appears to treat previous applications to the High Court and Crown Court on an equal footing.

However, in our judgment, the judge's decision was not correct. The jurisdictions of the Crown Court and of the High Court in relation to the granting of bail remain quite distinct, notwithstanding that judges of the High Court are empowered to exercise the jurisdiction and powers of the Crown Court and, when so doing, are judges of the Crown Court (see s. 4(2) of the Courts Act, 1971). Order 79, r. 9(12), relates exclusively to the jurisdiction of the High Court.

The origin of this rule is clear. There was at one time a widespread belief that the jurisdiction of the High Court to grant bail was not that of the High Court as such, but of the individual judges of that court. The logical consequence would be that the decision of one judge to refuse bail would not preclude another judge from entertaining the same application immediately thereafter or perhaps even simultaneously. This belief should not have survived the decisions of *Re Hastings* (1), *Re Hastings* (No. 2)(2) and *Re Hastings* (No. 3)(3), at least in relation to applications made in term time. However, it was resurrected in *Re Kray* (4) and Order 79, r. 9(12) was made in order to put the matter beyond doubt. It was also designed to affirm that the jurisdiction of the High Court was that of the court rather than of the individual judges and that it was exercisable only by the judge in chambers. It may avoid further difficulties if we point out that the words 'any other judge' in the sentence 'The applicant shall not be entitled to make a fresh application for bail to any other judge' refer to the judge in chambers and not to the particular judge who considered the earlier application or applications.

Order 79, r. 9(12) was not an obstacle to the exercise by Judge Blomefield of the Crown Court's jurisdiction; he should have considered the applicants' claim to bail on their merits.

Four further things should perhaps be said. The first is that although the Crown Court Rules contain no provision which is equivalent to RSC Order. 79, r. 9(12), it should not be thought that simultaneous or immediately consecutive applications for bail can be made to more than one Crown Court judge. The jurisdiction is that of the Crown Court and not of the individual judges exercising that jurisdiction. It may be that it would be better if the Crown Court Rules made this clear. At present there is only a practice direction from Lord Widgery CJ (5) in the following terms:

- (1) 122 JP 283; [1958] 1 All ER 707; [1958] 1 WLR 372
- (2) 123 JP 79; [1958] 3 All ER 625; [1959] 1 QB 358
- (3) 123 JP 502; [1959] 3 All ER 221; [1959] 1 WLR 807
- (4) [1965] 1 All ER 710; 1965 1 Ch. 736
- (5) [1971] 1 WLR 1535, 1538

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'15. (i) Where a person gives notice in writing to the Crown Court that he wishes to apply for bail, and requests that the Official Solicitor shall act for him in the application, the application shall be heard by a Crown Court judge in London.

(ii) All other applications shall be heard at the location of the Crown Court where proceedings in respect of which the application for bail arises, took place or are due to take place.'

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This does not cover the point in question here.

Secondly, the decision of this court in *R v. Nottingham Justices, ex parte Davies* (6) (the rights of an applicant to make a fresh application for bail on a change of circumstances) in terms refers only to applications for bail which are made to the magistrates' court. However, the same principles apply to applications to the Crown Court.

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Thirdly, a judge of the High Court may, under the inherent jurisdiction, hear an application for bail after an application by the same person has been refused by a judge of the Crown Court and Ord. 79, r. 9(12), is no bar.

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Fourthly, there may be some confusion as to the theoretical position of the judge in chambers when considering applications for bail from prisoners who are subject to the jurisdiction of the Crown Court. If the application under para. 15(i) of the Practice Direction (7) comes through the Official Solicitor, it seems that the judge is likely to be acting as a 'Crown Court judge in London', whereas in all other cases including other cases which come through the Official Solicitor he is probably acting as a judge of the High Court. This is of no practical importance in terms of the success or failure of the application. The judge who considers the application will in fact be a High Court judge and accordingly he will have no cause to consider in which capacity the application comes before him. But the position is certainly untidy. As the applicants no longer need the relief which they originally sought, there will be no order on these applications.

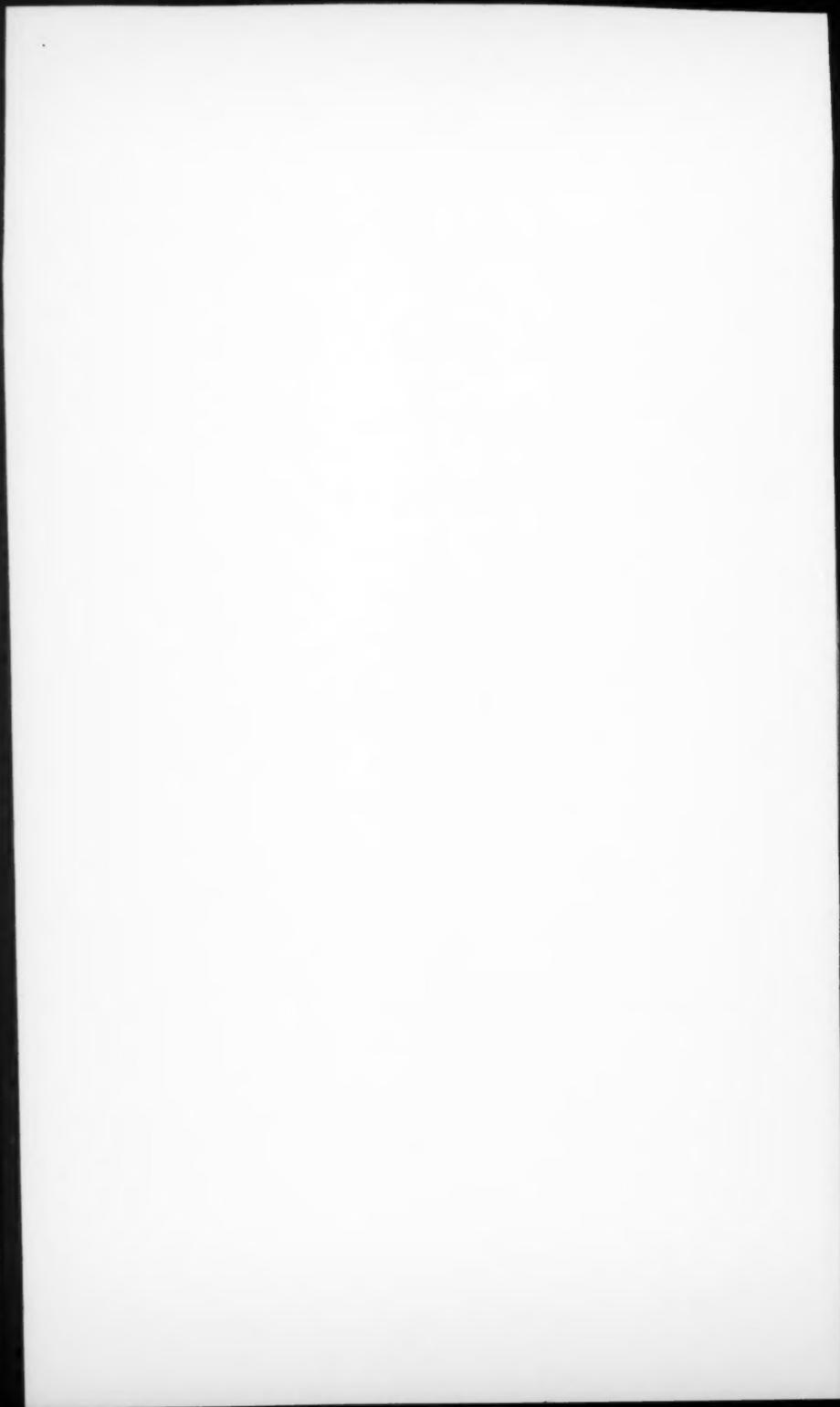
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Solicitors: C.R. Thomas & Son, Maidenhead.

Reported by G.F.L. Bridgman, Esq., Barrister.

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QUEEN'S BENCH DIVISION
(Ackner, L.J. and Skinner, J.)

December 12, 1980

R v ST ALBANS JUVENILE COURT. EX PARTE GODMAN

R. v.
St. Albans
Juve. Court
Ex parte
Godman

Queen's Bench
Division

Magistrates – Juvenile court – Defendant aged 16 when charged and pleading – Defendant becoming 17 before date of hearing of case – Children and Young Persons Act, 1969, s.6. – Criminal Law Act, 1977, s.19(1).

On October 9, 1979, the applicant, then aged 16, appeared before a juvenile court and pleaded not guilty to a charge of stealing. The case was then adjourned until November 13. On October 27 the applicant became 17. The justices contended that the relevant point in time for them to decide whether the hearing was to proceed in accordance with s.6 of the Children and Young Persons Act, 1969, as a summary trial of a young person, or in accordance with s.19 of the Criminal Law Act, as of a person who had attained the age of 17 was when the applicant first appeared in the juvenile court charged with the offence and that the relevant age for the purpose of those sections was his age at that time. On the application of the applicant for orders for judicial review to quash the decision of the justices, prohibit them from adjudicating on the information against him, and for mandamus directing the justices to permit him to exercise his right to trial by jury,

Held: on October 9 the applicant had not begun to be tried for the offence alleged against him, all he had done was to enter a plea of not guilty; having regard to s.19(1) of the Criminal Law Act, 1977, he should be tried according to the provisions of ss.20 to 24 of the Act relating to the trial of persons who have attained the age of 17; the applicant would be granted the orders for judicial review which he claimed.

Applications for orders for judicial review.

G. Ames for the applicant.

W. Boyce for the respondent.

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ACKNER, L.J.: Nigel John Godman was born on 27th October, 1962. In July, 1979, when he was 16, he was served with a summons to answer an information that he had stolen £232 cash, the property of the St. Albans Co-operative Society Ltd. On 9th October, 1979, when he was still 16, he appeared before the St. Albans Juvenile Court and pleaded not guilty. Apparently his case was listed only for plea, and, once he had pleaded, the case was adjourned to 13th November. By 13th November he had become 17. His counsel had advised him that it was in his interests to be tried by judge and jury in the Crown Court and he applied for him to be put to his election. He submitted (i) as the defendant was now 17 years of age, the provisions of s.19 of the Criminal Law Act, 1977, required that he be given the opportunity to elect trial by jury and that the justices had no discretion to refuse him that opportunity. Alternatively, (ii) if it was a matter of discretion, then discretion should be exercised in his client's favour. The justices, in an affidavit provided by their chairman, have stated that they were

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of the opinion that the relevant point in time for the court to decide whether the hearing was to proceed in accordance with the provisions of s.6 of the Children and Young Persons Act, 1969, or with the provisions of s.19 of the Criminal Law Act, 1977, was when the juvenile first appeared in court charged with the offence, and the relevant age for the purpose of these sections was the age of the juvenile at that time. They felt that decision to be a once and for all decision and that the court had no discretion to reverse it on the defendant attaining the age of 17 years. The chairman went on to say that, if the matter had been discretionary, they would have insisted on summary trial

"bearing in mind that offences of this nature were frequently tried summarily, and that the factors present did not make it desirable that the case be heard before a jury".

Nigel Godman accordingly applies for orders for judicial review, namely certiorari to remove the decision into this court for the purpose of it being quashed, prohibition to prohibit the justices from further adjudicating on the information against him, and mandamus directing the justices to permit him to exercise his right to choose trial by jury. The relevant statutory provisions are: (i) s.48(1) of the Children and Young Persons Act, 1933:

"A juvenile court sitting for the purpose of hearing a charge against . . . a person who is believed to be a child or young person may, if it thinks fit to do so, proceed with the hearing and determination of the charge . . . notwithstanding that it is discovered that the person in question is not a child or young person."

(ii) Section 6 of the Children and Young Persons Act, 1969:

"Where a person under the age of seventeen appears or is brought before a magistrates' court on an information charging him with an offence, other than homicide, which is an indictable offence within the meaning of the Magistrates' Court Act, 1952, he shall be tried summarily unless — (a) he is a young person and the offence is such as is mentioned in s.53(2) of the Act of 1933 . . . and the court considers that if he is found guilty of the offence it ought to be possible to sentence him in pursuance of that subsection; or (b) he is charged jointly with a person who has attained the age of seventeen and the court considers it necessary in the interests of justice to commit them both for trial . . .".

(iii) Section 19 of the Criminal Law Act, 1977:

"(1) Sections 20 to 24 . . . shall have effect where a person who has attained the age of seventeen appears or is brought before a magistrates' court on an information charging him with an offence triable either way."

Sections 20 to 24 deal with the procedure for determining the mode of trial of offences which can be tried either summarily or by trial

CASES REPORTED TO MARCH 31, 1981

CHILD — Care — Assumption by authority of parental rights and duties — Parent consistent by failing to discharge obligations of parent — Children Act, 1948, s. 2, as substituted by s. 57 of Children Act 1975.

R. v. Sunderland Borough Council.

Fam. Div. 117

CHILD — Care — Resolution by local authority — Objection by mother — Hearing by justices — Social officer seen by justices in private — Disputable evidence to be given by social officer.

W. v. Sunderland Borough Council.

Fam. Div. 117

CHILD — Care — Voluntary committal to care of local authority — Ward of court — Duty of local authority — Welfare of child paramount consideration — Decision by court of all serious issues relating to child — Need for approval of court to major change in child's way of life.

Re C.B.

CA 90

CHILD — Neglect — Unnecessary suffering or injury to health — Charge of offence by parents — Proper direction to jury — Children and Young Persons Act, 1933, s. 1(1).

R. v. Sheppard.

HL 65

CRIMINAL LAW — Offence — Charge — Information bad for duplicity — Single transaction covering period of time — Sexual Offences Act, 1956, s. 33.

Anderston v. Cooper.

QBD 128

CRIMINAL LAW — Perverting course of justice — Conduct which may lead, and is intended to lead, to miscarriage of justice — Need to prove tendency to pervert course of justice — Insufficiency of intention.

R. v. Machin.

CA 21

CRIMINAL LAW — Trial — Right of prosecuting counsel to request member of jury panel to stand by — Need to show that member of panel biased — Need to inform defence regarding information received.

R. v. Mason.

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CROWN COURT — Supervisory jurisdiction of High Court — Certiorari — Jurisdiction of Crown Court other than its jurisdiction in matter relating to trial on indictment — Order to supply to parties details of jury panel — Courts Act, 1971, s. 10(5).

R. v. Sheffield Crown Court, Ex Parte Brownlow.

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EDUCATION — Attendance at a course — Award by education authority — Person "ordinarily resident" in United Kingdom for three years — Education Act, 1962, s. 1 — Local Education Authority Regulations, 1979, reg. 13(a). R. v. London Borough of Barnet, Ex Parte Shah.

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Cicutti v. Suffolk County Council.

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FIREARM — Need for certificate — Shot gun — Rifle converted to smooth bore — Firearms Act, 1968, s. 1(3)(a).

R. v. Hucklebridge Attorney-General's Reference (No. 3 of 1980).

CA 13

IMMIGRATION — Offence by immigrant — Sentence — Recommendation for deportation — Principles on which orders recommending deportation should be made.						
R. v. Nazari	...	...	...	...	...	CA 102
LEGAL AID — Refusal by justices — Appeal — Need to show that justices' decision unreasonable.						
R. v. Greater Manchester Justices. Ex Parte Horsley	...	...	...	...	QBD	19
LOCAL AUTHORITY — Order — Infringement — Need to prove knowledge by defendant of existence of order — Tree preservation order — Town and Country Planning Act, 1971, s. 102(1).						
Maidstone Borough Council v. Mortimer	...	...	...	...	QBD	45
NATIONAL ASSISTANCE — Accommodation for persons in need of care and attention — Charges for accommodation — Provision of accommodation by voluntary organization — Payment of charges by local authority — Reimbursement by person for whom accommodation provided — National Assistance Act s. 26(3).						
Dorset County Council v. Greenham	...	...	...	...	QBD	125
OBSCENE PUBLICATION — Obscene display of images on screen — Images derived from video tape — Obscene Publications Act, 1959, s. 1(2), (3). Attorney-General's Reference (No. 5 of 1980)	...	...	...	...	CA	110
PRISON — Discipline — Adjudication by board of visitors — Proceedings by prisoner alleging adjudication null and void — Action for declaration — Judicial review — R.S.C., Order 53, r. 1.						
Heywood v. Hull Prison Board of Visitors	...	...	...	...	Ch. Div.	25

before judge and jury.

It is clear from the facts set out above that Nigel Godman has not as yet begun to be tried for the offence alleged against him. All he has done is to enter a plea of not guilty. Accordingly, the question that had to be decided on 13th November was: How was this young man of 17 to be tried? To this question the short answer would appear to be in accordance with the procedure laid down by ss.20 to 24 of the Criminal Law Act, 1977, having regard to the provisions of s.19(1) as set out above. To this counsel for the justices makes but one short submission. Under s.21(2) it is clear that the mode of trial is decided before the plea is entered. Here, the plea having been entered, it is too late to seek to alter the mode of trial. Counsel is perfectly correct in his submission that s.21 presupposes in the ordinary case that the mode of trial will be decided before the plea is taken, but this is no ordinary case. Parliament has given to those who have attained the age of 17 a statutory right in certain circumstances, of which this is an example, to be tried by a jury. Of course Parliament could have provided that, if the applicant is 16 when charged, he has no entitlement to trial by jury even though he attains 17 before his trial commences, but very clear words would be needed to enact such a provision. I would not accept that it could be achieved by the side wind upon which counsel for the justices relies. It must not be overlooked that there is a common law right to be tried by a jury and such a right is not to be lightly removed. The procedural difficulty which is pinpointed by council's submission can be simply dealt with by the accused, who has pleaded but has not yet been tried, being asked, in the event of his reaching 17 years, whether he still consents to be tried summarily. The court will at the same time, pursuant to its statutory obligation under s.21(2), provide the explanation there stipulated.

I have been at pains to stress that at no material time had 'the trial of the applicant been embarked upon. If on 9th October, 1979, in addition to taking his plea, the court had heard evidence and then adjourned the case part-heard, I would certainly tend to the view that the matter then became one for the exercise of the justices' discretion under s.48 of the 1933 Act. It is however not necessary finally to determine that point on this application.

I would, accordingly, grant the applications for the orders referred to above.

SKINNER, J.: I agree. On the facts which have been outlined by my Lord two questions arise on this application: (i) had the applicant a right at that stage to elect trial by jury? (ii) if not, had the justices a discretion to allow him to elect for trial by jury? The answers to these questions lie wholly in the statutory provisions which have already been referred to by my Lord.

In my judgment the decisive provision is s.19 of the Criminal Law Act, 1977. That Act deals with a fundamental right of any citizen over 17 charged with a serious offence. It is mandatory in its terms. Sub-section (1) reads:

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"Sections 20 to 24 . . . shall have effect where a person who has attained the age of seventeen appears or is brought before a magistrates' court on an information charging him with an offence triable either way."

The applicant in this case had attained the age of 17, and he did not appear before the magistrates' court, charged with an offence triable either way. Subsection (2) provides that everything the court is required to do by ss.20 to 23 must be done before any evidence is called. Sections 20 to 23 lay down the familiar procedure followed when an offence triable either way normally comes before the courts.

Counsel for the justices in his short, but nevertheless effective, argument for the respondents submitted that once the plea had been taken in the magistrates' court or the juvenile court that determined the court of trial once for all and he drew our attention to the provisions of s.21(2)(b). This deals with the position if the magistrates have decided that an offence triable either way may be tried summarily and goes on to give the accused his right of election between summary trial and trial by jury. Counsel points out that, if the accused had already pleaded, and had pleaded guilty, then it would seem inappropriate to give him the warning set out in the subsection. That was the only real anomaly that he could point to if the argument advanced on behalf of the applicant were to succeed. It is not enough, in my judgment, to displace the clear meaning of s.19 which itself provided the point of no return in subs. (2). The watershed, or point of no return, for the purpose of the problem which arises in this case is the calling of evidence and not the taking of the plea. Thus the answer to the first question which I have posed earlier is that the applicant had a right to trial by jury at the stage at which he claimed it on 13th November, 1979.

Turning to the second question, if I am right in the above, I would accept the submission by both counsel that s.29(1) of the Children and Young Persons Act, 1963, applies only to questions of disposal and not to questions of trial. Until it was amended by the Children and Young Persons Act, 1969, that section merely dealt with what are broadly called "care proceedings" and the amendment in 1969 would, for example, allow a court which had made a finding of guilt against a 16-year old and adjourned the case for reports to resume the hearing and pass sentence if he attained 17 years during the adjournment.

If I am wrong in my interpretation of s.19 of the 1977 Act, then the scheme of the statutory provisions has to be looked at again from a different angle. In view of the conclusion I have reached on the first question, it is neither necessary nor desirable to do this now. For the reasons I have given I agree with the orders proposed by my Lord.

Orders accordingly

Solicitors: *Kingsley Wood & Co.*, for *Anderson-Davis & Metcalfe, St. Albans; Woolley & Weston*, St. Albans.

Reported by G.F.L. Bridgman, Esq., Barrister.

QUEEN'S BENCH DIVISION
(Ackner L.J., and Jupp, J.)

BISHOP v. GLOUCESTERSHIRE COUNTY COUNCIL

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Child – Care – Committal into care of local authority – Appeal by parents to Crown Court – Competency – Children and Young Persons Act, 1969, s.1, s.2(12).

On the application of the respondent council a juvenile court made an order under s.1 of the Children and Young Persons Act, 1969, committing a child aged 18 months into the care of the respondents. The parents gave notice of appeal to the Crown Court "on behalf of the child". The respondents contended that the Crown Court had no jurisdiction to hear the appeal as s.2(12) of the Act gave a right of appeal only to the infant who was the subject of the order and an infant who lacked the capacity to give instructions for an appeal had no right of appeal. The Crown Court upheld that contention, and the parents appealed to the Divisional Court.

Held: the Crown Court had jurisdiction to hear an appeal by an infant which was brought on its behalf by its parents; if it became apparent that the parents were arguing on their behalf and without reference to the welfare of the child the Crown Court would dismiss the appeal; the present appeal would be allowed,

Statute – Provisions not brought into effect – Consideration by the court.

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Where the provisions of a statute have not been brought into effect they are nevertheless part of the statute law of the country and are to be taken into consideration as such.

Case Stated by Gloucester Crown Court on an appeal from Cheltenham Juvenile Court.

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*S. Shiner for the appellants;
M. Bishop for Gloucestershire County Council.*

Ackner, L.J.

ACKNER: L.J.: On 14th September, 1979, the Juvenile Court for the petty sessional division of Cheltenham, on the application of the respondents, the Gloucestershire County Council, under s.1 of the Children and Young Persons Act, 1969, in respect of Marion Bishop, a child of 18 months, found that her proper development was being avoidably prevented or neglected or her health was being avoidably impaired or neglected or that she was being ill-treated and also that she was in need of care and control which she was unlikely to receive unless an order under s.1 was made, and accordingly they made an order committing the child into the care of the respondents. On 4th October, 1979, *on behalf of that child*, a notice of appeal against that order was given by the parents. I stress the words "on behalf of that child". The notice was so found in the Case, and we have had the notice of appeal read to us: it purports to be a notice of appeal given on behalf of the child by the parents. On 2nd November, 1979, in the Crown Court the respondents contended that that court had no

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jurisdiction to hear the appeal. The respondents' contention, as set out in the Case was that as s.2(12) of the Act only gave a right of appeal to the relevant infant, that is, the infant the subject-matter of the order, no appeal could be made on the infant's behalf, and, as extended in this court by counsel for the respondents, no infant who lacks the capacity to give instructions for an appeal has under the section any right of appeal. This contention was upheld by the Crown Court. The Case states that the Cardiff Crown Court and other Crown Courts take the same view. I am bound to say, until I had the benefit of the sustained submissions of counsel for the respondents I would have thought the point for which the respondents contend was unarguable.

I start with the words of the section. They read as follows:

'The relevant infant may appeal to the Crown Court against any order made in respect of him under the preceding section except such an order as is mentioned in subs.(3)(a) of that section.'

That reference is not relevant to this case. So Parliament has given, as I see it, any infant who is the subject of the appropriate order a right of appeal. It has not circumscribed or defined the age which the infant has to attain before it can appeal. It has not made any reference to it having to attain a certain, or given or defined capacity.

The principal basis for the contentions of counsel for the respondents are to be found in s.70(2) of the Act. The heading of that section is 'Interpretation and ancillary provisions'. It reads as follows:

'Without prejudice to any power apart from this subsection to bring proceedings on behalf of another person, any power to make an application which is exercisable by a child or young person by virtue of s.15(1) [which relates to discharge of supervision orders], s.21(2)' [which relates to care orders], 's.22(4) or (6) or 28(5) of this Act shall also be exercisable on his behalf by his parents or guardian'.

It is necessary for counsel's argument to treat the words "without prejudice to any power apart from this subsection" and the word "also" as being otiose, because he says this section does what it does not purport to do, that is, define *all* categories of applications in which application may be made in respect of a child on his behalf by his parent or guardian. That the draftsman should have fallen into that error is remarkable, but that Parliament should have overlooked it when it came to enact the Children Act, 1975, seems to me to be quite startling. By s.64 of that Act provision is made for cases — and they must frequently arise, having regard to the grounds upon which care orders can be and are usually made — where there may be conflict between the interests of the parent and the interests of the child. A new s.32A provides inter alia:

"(1) If before or in the course of proceedings in respect of a child or young person — ... (d) on an appeal to the Crown Court under s.2(12) of this Act ... it appears to the court that there is or may

be a conflict, on any matter relevant to the proceedings, between the interests of the child or young person and those of his parent or guardian, the court may order that in relation to the proceedings the parent or guardian is not to be treated as representing the child or young person or as otherwise authorised to act on his behalf."

There is provision in another new section (32B) that in that situation a guardian ad litem of the child or young person is to be appointed for the purpose of those proceedings. That to my mind makes it perfectly clear that the draftsman of the 1975 Act assumed that s.2(12) enables the relevant infant to appeal by having that appeal brought on his behalf by his parents. Otherwise there was no need at all to enact 32A(1)(d). Regarding that, Mr. Bishop makes two comments. First he says: Yes, the draftsman has got it wrong, and, secondly, I need pay no, or little, attention to it, because the provisions of that section have not yet been brought into effect. So far as his latter point is concerned, I think it is wholly invalid. Whether those provisions have yet been brought into effect or not, that is part of the statute law of the country, and it is wholly inconsistent with his submission. It is wholly consistent with s.70(2) saying what it purports to say, that without prejudice to any other power there shall also be exercised on behalf of the infant by his parents the powers there referred to. Significantly, counsel, on the basis that s.70(2) was wholly inclusive as to its provisions, drew attention to s.21(4), which is not referred to in that section, and said that that supported his conclusion. Section 21(4) is in fact referred to specifically in sub-paragraph (f) of s.32A, and the submission based upon that point seems to me to be open to the same comment.

That a parent can bring on behalf of his child an appeal is recognised *sub silentio* in *In Re D.G.M.S.* (1) That was a case in which a care order was made because the local authority considered the parents were neglecting the children's education. There was an appeal to the Crown Court, and from the Crown Court a Case was stated to the Divisional Court which subsequently went to the Court of Appeal. No suggestion was made at any stage throughout that case, and I can say this because I was a member of the Divisional Court, that the infant had no right to appeal to the Crown Court through the medium of the use of the parents.

In *In re H.(2)* there is this observation by Ormrod, L.J.

"No corresponding amendment has yet been made to the Act of 1969, probably because care orders are used for two quite different classes of case; one involving unruly, sometimes criminal, behaviour by the child or young person, the other neglect or ill-treatment of the child by parents or others. There is, however, no logical reason to differentiate between care orders intended for the protection of a child against parents and s.2 orders under the Act of 1948; moreover, the restricted rights of appeal under the Act of 1969 produce

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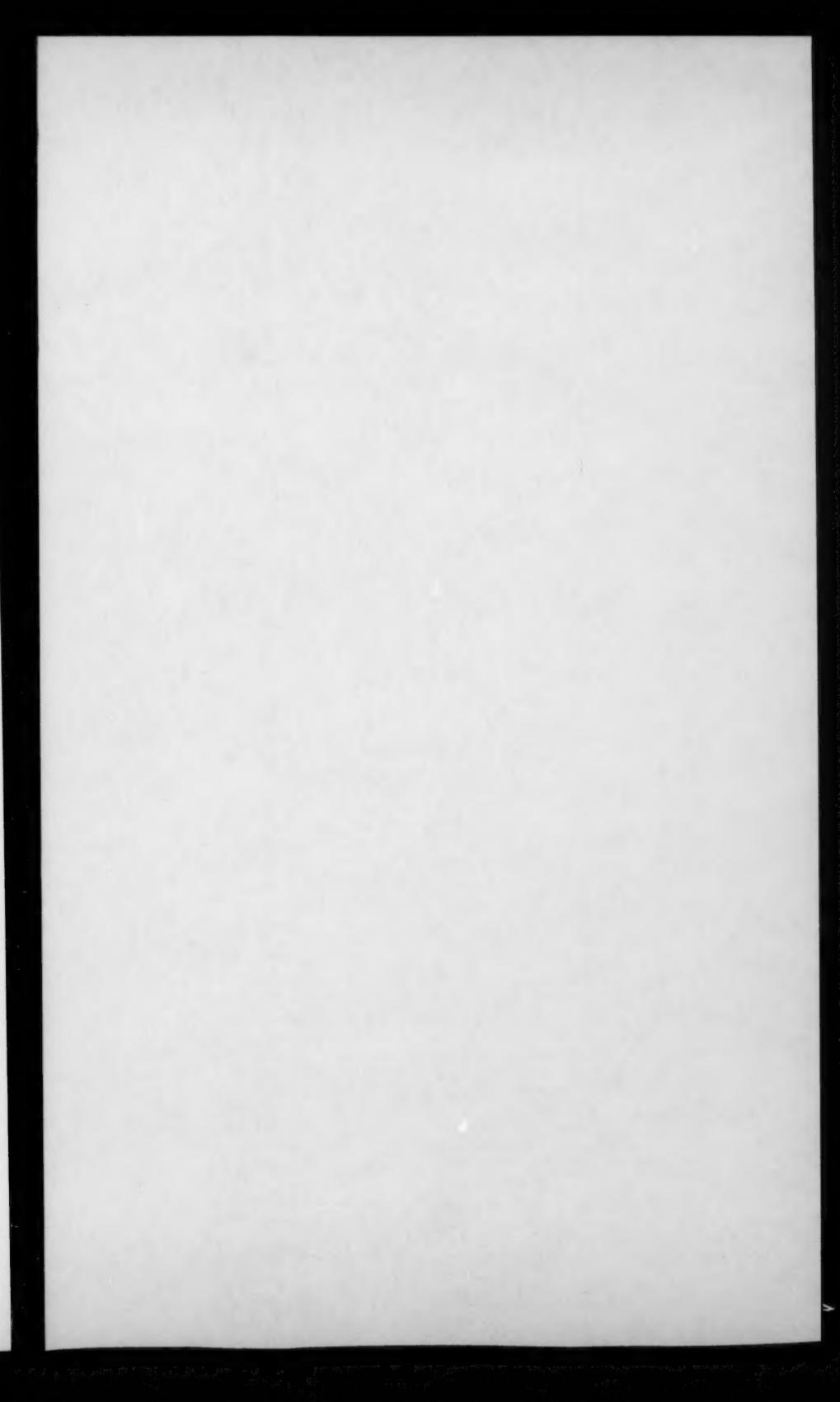
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undesirable anomalies. The parents have no right of appeal in their own right, although they can act on behalf of the child (whose interests may be in direct conflict with their own)."

It was because of that fact that provision was made in s.32A and s.32B of the Children Act, 1975, to which I have made reference. Why there is still delay in bringing these provisions into effect is unknown either to this court or counsel appearing before us.

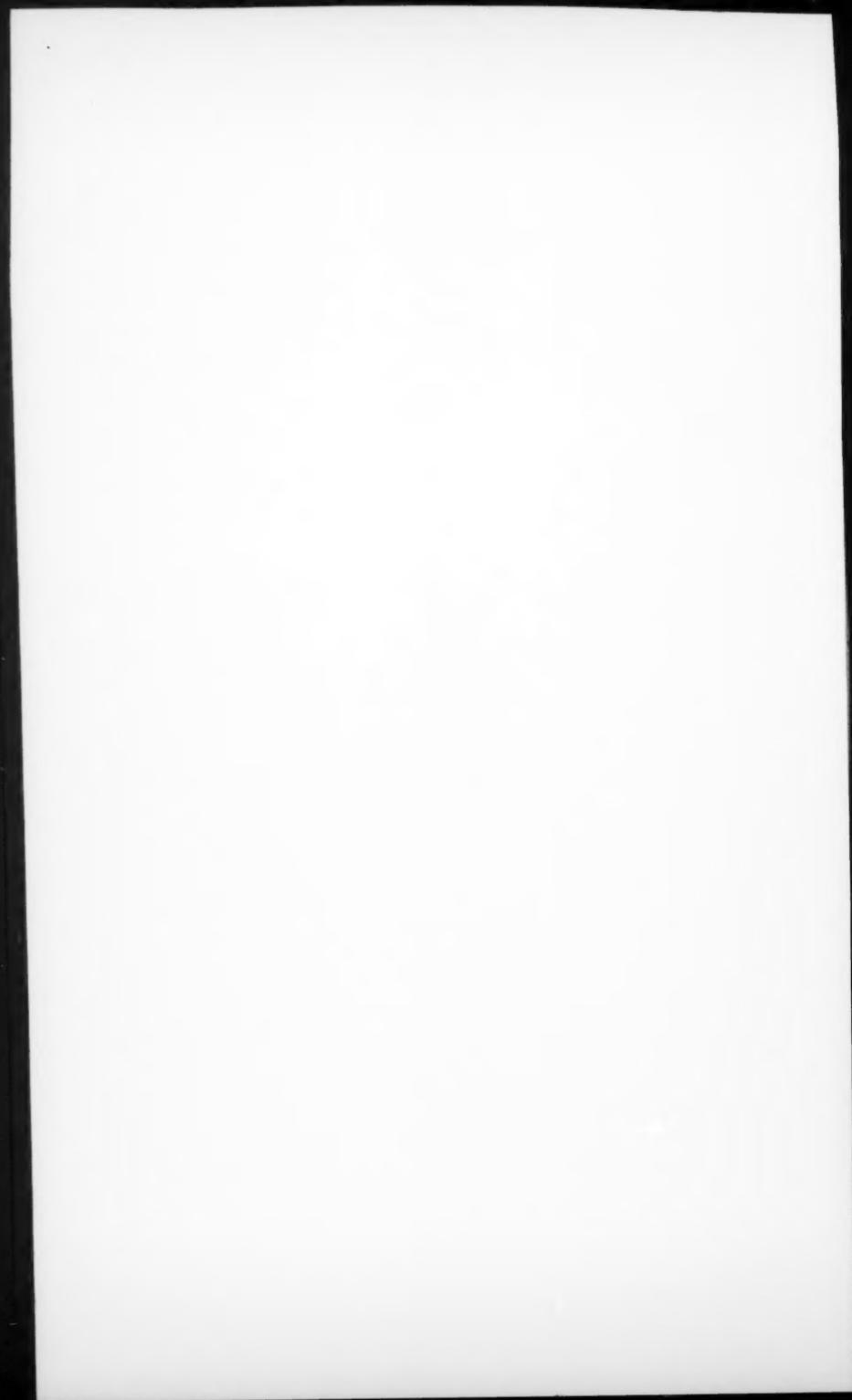
I, therefore, come back to s.2(12) of the Children and Young Persons Act, 1969. I reject the suggestion that that section should be read with the following, or comparable, words after the word "relevant infant": "providing he has the capacity to give instructions". If I were wrong in my judgment, one can see the following situation occurring again and again. A solicitor would give notice to the Crown Court saying that he wished an appeal to be entered by XYZ, an infant. The matter having thus come to the court, there would then have to be, either at the instance of the court or at the instance of the respondent, an inquiry into the capacity of the infant to give instructions once the infant had reached an age where that capacity was likely to exist. But not only would the court have to decide on its capacity to give instructions, no doubt assisted by psychiatrists, psychologists, social workers and other such experts or quasi-experts, but then the next issue would be - did the infant in fact give instructions? Where the infant had attended the solicitor with its parents, as one would expect to be the case, were the dominant instructions given by the parents or the child? Then no doubt, such being the nature of the litigation, if the infant did in fact give instructions, was it at the material time under the influence of its parents to such an extent that it really was not a free agent to give instructions? This seems to me to produce such a wholly unreal situation as not to be contemplated. As I said initially, I thought the point was unarguable. I am satisfied it is, and I would allow this appeal.

JUPP, J: The Children and Young Persons Act, 1933, gave a right of appeal against a care order to "the child or young person or his parent or guardian on his behalf" - that is to be found in s.102(1)(a) of that Act. Those words were picked up in s.70(2) of the Act of 1969, which gave the parent, on behalf of the child, the right to exercise certain rights of application which the child was given in specific sections of the new Act, but those sections did not include the section giving a right of appeal against a care order, namely, s.2(12). However that section gives the child the right of appeal without question against a care order, an appeal to quarter sessions. To give that efficacy in spite of the fact that the words "or by the appellant or guardian on his behalf" do not appear there, it must be the case in a large number, perhaps even a majority, of cases where there is to be an appeal by the infant, because of the infant's tender years or other matters, an appeal will in fact have to be prosecuted by a parent and in most cases, and certainly in the case of a child of eighteen months, as in the present case, it will be the parents who will be the only people who can practically prosecute an appeal. To say otherwise would render the right of appeal useless in most cases.









In those circumstances I agree with my Lord that the question that the court has to answer is answered in this way, that the Crown Court has jurisdiction to hear an appeal by an infant which is brought on its behalf by its parents. In practice the court will have to hear argument and, of course, if it becomes apparent that the parents are arguing entirely for themselves and without reference to the welfare of the child, which is the predominant consideration in most of these cases, then on that ground it will ultimately dismiss the appeal. I agree that the appeal should be allowed.

Appeal allowed

Solicitors: *Stannard & Moss*, Cheltenham; Clerk to Gloucestershire County Council.

Reported by G.F.L. Bridgman Esq., Barrister.

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COURT OF APPEAL
(Watkins, L.J., Purchas, J., and Tudor Evans, J.)
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R. v. AUSTIN AND OTHERS

Criminal Law – Child stealing – Husband and wife separated – Child seized from wife by husband by force – Offences against the Person Act, 1861, s.56.

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An Englishwoman married in the United States a citizen of that country, and there was a female child of the marriage. Husband and wife did not get on well together and the wife came to this country, bringing the child with her. She obtained an order granting her the custody of the child who became a ward of court. The husband came to this country and took out a similar summons. The Official Solicitor was appointed guardian ad litem of the child and was content that care and control should remain with the mother. The husband engaged the appellants to take the child out of the possession of her mother. They found where the mother was living and accompanied the husband who accosted his wife when she was walking with the child in the street, jumping out of a car, seizing the child by force, and driving off with her at high speed. Later he returned to the United States. The four appellants were convicted of child stealing contrary to s.56 of the Offences against the Person Act, 1861. On appeal,

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Held: a parent who sought, especially where there was no order of a court in existence affecting the ordinary common law right of possession of parent to a child, to take away that child from the other parent by force committed the offence of child stealing unless it was shown that at the time there was lawful excuse for the use of force as a means of taking the child away; the appellants had no good reason for doing what they did, they were the paid hirelings of the husband to aid him in the commission of a criminal offence and with him they committed it as aiders and abettors; their appeals would be dismissed.

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Court of
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Appeals by Christopher Timothy John Austin, Ian Douglas Withers, Leeland Alexander Fieldsend and Barry Ronald Trigwell against their convictions at Winchester Crown Court of child stealing.

M. Kalisher for the appellants.
J. Sparkes QC and Gardner for the Crown.

WATKINS, L.J., delivered the following judgment of the court: This is a disturbing case. On 17th January, 1979, in the Crown Court at Winchester the appellants, Austin, Withers, Fieldsend and Trigwell whose ages range from 24 to 39 years, all pleaded guilty to child stealing. They did so at the conclusion of the Crown's case during a trial before Park, J., who had been invited to, and did, rule on submissions of counsel for the appellants. The submissions were to the effect that they could not in law, on facts which were not in dispute, be guilty of the offence charged, which was founded on the provisions of s.56 of the Offences against the Person Act, 1861. This case is obviously of importance to parents and children. From some of the submissions made to this court we have the impression that it is commonly understood that when parents have been separated one parent may against the will of the other take away by force a child or the children of the family. That notion, if it exists, needs to be dispelled.

Mrs Janice King when she was a single woman went from her home in this country to the United States of America. She took up employment there and met a United States citizen named Robert King, whom she married. They did not get on. On 30th June, 1975, she gave birth to a female child by him. The child became known as Lara. In March of the following year Mrs King came to England ostensibly to attend a wedding. Within a matter of a few weeks she decided not to return to the United States. She consulted solicitors with the object of obtaining a divorce. Before those proceedings commenced the solicitors issued an originating summons for an order granting her custody of the child. On the issue of that summons Lara became a ward of court. Mr King came to this country and took out a similar summons. The Official Solicitor was appointed guardian ad litem of Lara. Thereafter he had the right and duty to act in the best interests of the child in any proceedings which affected her. He was content that interim care and control, although there was no order to that effect, should for all practical purposes remain with Mrs King, who was living at that time near Winchester.

King was, not unnaturally, concerned at having lost his child so he sought relief from a court in the State of Maryland where he lives. On 29th October, 1976, that court ordered that he should have the care and control of the child. Mrs King was acquainted with the terms of that order. It was of no effect here since it could not be enforced in this country and Mrs King did not obey its terms. That court in May, 1977, declared her to be in contempt for failing to surrender the care and control of the child to her husband. It also issued a warrant for her arrest. That warrant could not be executed outside the United States, perhaps not outside Maryland.

King therefore decided to resort to other and far less desirable means of regaining possession of his child. He became acquainted with a firm

of inquiry agents in this country known as Nationwide Investigations. He asked this firm, of which the appellant Withers is a member, to find his wife and child. In late July, 1977, Withers found the wife and child and King engaged him to take Lara out of the possession of her mother for a fee of £2,000. Withers was aware of the orders of the court in Maryland. He was informed that there was no order affecting the child made by any court in this country. He planned an operation which apparently required the services of no less than three other husky warriors, namely, the other three appellants, Austin, Fieldsend and Trigwell. They all went off in a number of motor cars to Winchester. They spent the night in a hotel, no doubt going through the plan so that they would be sure of its details. King was with them, so that by now five men were ready to spring on the unsuspecting Mrs King. On 2nd August, at about 4.15 pm, she was walking along a street, pushing a perambulator in which was the child Lara. Along came a number of cars, in which were King, Withers and Fieldsend, Austin and Trigwell. The leading car came alongside Mrs King. Out of it jumped her husband. He seized the child, bundling her into the car while pushing his wife aside. The car was then driven off at high speed. Mrs King was beside herself; she was hysterical. Who came to her assistance? None other than Austin and Trigwell. The car they were riding in came up alongside her and stopped. They offered her assistance. She wanted to be driven to a telephone box so that she could speak to a policeman. They offered to take her to such a place. They did so, but so slowly that Mrs King suspected that they had something to do with what had happened to her child. How right she was. In due course she was dropped off. The cars sped towards Heathrow Airport. There was a change of motor cars. Meanwhile Mrs King was telephoning to the police; the police were putting out messages over their inter-communication system. An alert policeman on motor cycle patrol happened to note the registration number of the car in which Austin and Trigwell were riding. Mrs King had taken a number of the car in which Austin and Trigwell were riding. Mrs King had taken a careful note of it and had given it to the police. The motor cyclist gave chase. By now Austin and Trigwell had split up and were in two different but identical motor cars. The police stopped two cars, and apprehended the four appellants. King outdistanced the police. After all, a motor cycle is no match for an aeroplane. He was soon on his way by air to Dublin and from there to the United States. Withers gave wholly false and misleading information to put the police off the scent of King. In the course of an interview in which he revealed himself to be untrustworthy and in many respects untruthful, he informed the police that this was about the 53rd time he had been involved in snatching a child by force from one parent on behalf of the other. Time went by. Mrs King and her husband were divorced on his petition in the United States. She could not tolerate being parted from her child, so she went to the United States. She still lives and works there. She has obtained an order of access to her child, so that the family are to that extent reunited.

Nothing can excuse the reason why King enlisted the services of Nationwide Investigations, or the quite appalling way in which each one of the members of that firm behaved in assisting him to take the child away from her mother. But that does not automatically mean

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that any one of them is guilty of child stealing. At the close of the case for the Crown in the Crown Court at Winchester counsel for the appellants, to whom we are extremely indebted for his restrained, able and frank submissions to us, made a number of concessions on behalf of the appellants. He has repeated them to this court. They are: (i) that each of these appellants aided and abetted King in taking Lara away from the possession of her mother; and (ii) that the child was taken by King by the use of force on the mother and on the child. It was also conceded that they all knew the child was in the lawful possession of the mother, since there was no order in this country which affected her right to that at the material time and the order of the American court could not affect it in any practical way. It was also admitted that they had the intention to deprive the mother of possession of the child.

Having regard to those admissions and the background of this affair, one looks at s.56 of the Offences against the Person Act, 1861, which provides:

'Whosoever shall unlawfully . . . by force . . . take away . . . any child under the age of fourteen years, with intent to deprive any parent . . . of the possession of such child . . . shall be liable, at the discretion of the court . . . to be imprisoned: Provided, that no person who shall have claimed any right to the possession of such child, or shall be the mother or shall have claimed to be the father of an illegitimate child, shall be liable to be prosecuted by virtue hereof on account of the getting possession of such child . . .'

It is submitted that there are two questions relevant to the issue of whether the appellants were rightly convicted: (i) did King commit an offence under s.56, bearing in mind that he assaulted his wife and when taking the child away the child too, and (ii) if King committed an offence under s.56, does it follow that the appellants are also guilty of that offence? Furthermore, suppose King had been indicted and found not guilty by reason only of being able to take advantage of the proviso, could the appellants have escaped conviction in that way too? It is argued that the mother and the father were equally entitled in law to custody of the child. While this is not disputed by counsel for the Crown, who has assisted us greatly, he reminded us of the rights and obligations of the Official Solicitor. But counsel for the appellants submits that, although the mother had actual possession of the child with the consent of the Official Solicitor, the father had a right to regain possession of the child at will, and to do almost anything including the use of violence on the mother with the assistance of a gang of men to achieve this without being guilty of an offence under s.56. It is an alarming proposition, which requires, and has had, our careful consideration.

It is argued that what was done did not infringe the provisions of s.56 since no one committed an independent unlawful act. King might have been convicted of conspiracy or of an assault on his wife had he been proceeded against. One of the appellants might have been convicted of perverting the course of justice, but these offences would not have proved that King behaved unlawfully in taking away the child. He had a right to take his child away. The mind boggles at what might

happen if that be right. We could easily descend into a state of almost complete anarchy in domestic affairs if that is a permissible interpretation of s.56. Parliament surely could not have contemplated so extraordinary a state of affairs, namely the assertion of a right to possession of a child by the use of violence.

Counsel for the Crown submits that if a father snatches his child away from the mother by the use of force and has no lawful excuse for using that means to obtain possession of the child, he is guilty of an offence. It would be difficult to envisage what lawful excuse there could be for the use of violence in such a circumstance. In considering the meaning of the word 'unlawfully' assistance can be derived from *R v Prince* (1). In that case there had been a conviction under s.55 of the 1861 Act of unlawfully taking an unmarried girl under the age of 16 out of the possession and against the will of her father. The principal issue was whether the defendant knew that at the relevant time the girl was under the age of 16 years. The decision turned on the meanings of the word 'unlawfully' as used in s.55. In the course of his judgment Denman, J., said:

'Bearing in mind the previous enactments relating to the abduction of girls under sixteen, 4 & 5 Phil. & Mary, c. 8 [the Abduction Act 1557], s.2, and the general course of the decisions upon those enactments, and upon the present statute, and looking at the mischief intended to be guarded against, it appears to me reasonably clear that the word "unlawfully", in the true sense in which it was used, is fully satisfied by holding that it is equivalent to the words "without lawful excuse" using those words as equivalent to "without such an excuse as being proved would be a complete legal justification for the act, even where all the facts constituting the offence exist".'

In our judgment, that construction of the word 'unlawfully' can properly be applied to the identical word as used in s.56 of the 1861 Act. Therefore a parent who seeks, especially when there is no order of a court in existence affecting the ordinary common law right of possession of parents to a child, to take away that child from the other parent by force will inevitably commit the offence of child stealing under s.56, unless it be shown that at the time there was lawful excuse for the use of the force as a means of taking the child away. Accordingly, apart from the proviso, King on the known facts could have had no defence if charged with this offence.

Undoubtedly King could properly have claimed a right of possession to the child and so have gained the protection of the proviso. What would have been the effect of that? The effect would have been that, although he had committed the offence of child stealing, because he was the child's father and could claim a right to possession of the child he would not have been prosecuted. It is submitted on the appellants' behalf that the proviso also protects a class of persons wide

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enough to include those who aid a person such as the father of a child in gaining possession of his child by force. They become his agents for the purpose. Many persons have from time to time the temporary possession of a child as agents of parents. Why are they not protected to the same extent as parents when regaining possession as agents for parents?

In our view the only sensible construction of the proviso allows of its protection being granted to a small class of persons only, which includes the father and the mother of the child, whether the child be legitimate or illegitimate, or a guardian appointed by a testamentary document or by an order conferring the status of guardianship, or a person to whom is granted an order conferring some form of care, control, custody or access. We can think of no other who could claim exemption from prosecution by reason of the proviso.

What of these appellants? They had no good reason for doing what they did. They had no right to assert, and no interest in, the possession of the child. They were the paid hirelings of King to aid him in the commission of a criminal offence, namely stealing a child, and with him they committed it as aiders and abettors. While King may shelter behind the proviso, there is no room there for them. Parliament in its wisdom undoubtedly decided that the mischiefs of matrimonial discord which are unhappily so widespread should not give rise to wholesale criminal prosecutions arising out of disputes regarding children, as to who should have possession and control of them. That and that alone is the reason for the existence of the proviso to s.56. Thus, as we have said, its application is confined to the select class of persons we have endeavoured to define.

It should be clearly understood that those such as these appellants who aid a father or a mother to take possession of a child from the other parent, and who do so by the use of force as aiders and abettors to it, commit the offence of child stealing, and that they are not immune from prosecution. This was a wicked example of aiding and abetting the commission of the offence, child stealing. In the judgment of this court, the appellants are extremely fortunate that the trial judge treated them so mercifully by the sentences he imposed. This kind of activity must be condemned and those who are tempted to engage in it should be deterred from doing so.

Appeals dismissed.

Solicitors: *Treasury Solicitor.*

Reported by G.F.L. Bridgman, Esq., Barrister.

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March 19, 1980

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R. v. CROYDON JUSTICES. EX PARTE LEFORE HOLDINGS LTD

Magistrates — Case stated — Application for — Identification of questions raised in case — Effect of omission — Magistrates' Courts Act, 1952, s. 87 — Magistrates' Courts Rules, 1968, as amended by the Magistrates' Courts Amendment (No 2) Rules, 1975, r. 65.

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Section 87 of the Magistrates' Courts Act, 1952, provides that an application to justices to state a Case for the opinion of the High Court shall be made within 21 days after that on which the decision of the magistrates was given.

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By r. 65 of the Magistrates' Courts Rules, 1968, as amended, an application under s. 87 of the Act of 1952 shall identify the questions of law or jurisdiction on which the opinion of the High Court is sought.

On November 22, 1978, justices granted a distress warrant against the applicants in respect of their rateable occupation of some waste ground. The applicants applied to the magistrates to state a Case on the ground that there was no evidence on which the magistrates could find that the applicants had been in rateable occupation of the land. The 21 days in which the application had to be made expired on December 13. On that day the magistrates' clerk wrote to the applicants asking them to identify the question or questions on which the opinion of the High Court was sought. The letter was delayed in delivery, but it was answered on January 10 when the magistrates decided that as there had not been any proper identification of the issue in the application to state a Case the application was out of time and was rejected. The applicants applied to the Divisional Court for a judicial review of the magistrates' decision. That application was refused. On appeal to the Court of Appeal,

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Held: the court should be chary about relaxing what appeared to be the strict provisions of the 1975 rules, but the whole scope and purpose of the enactment must be considered and one must assess the importance of the provision which has been disregarded and its relation to the general object of the legislation; in the present case the general object of the rules was the speeding-up of justice, not the curtailment of opportunities of doing justice; all sorts and manner of persons came before magistrates' courts and it would be sad if in matters which were largely penal and involved the liberty of the persons concerned a mere failure to comply with a procedural rule should keep an applicant away from the seat of justice; the court could not begin to waive the strict provisions of the law unless there had been a substantial compliance with the regulations; in the present case there had been substantial compliance with the rule and the subsequent events and correspondence had clarified the matter for the magistrates; they would be ordered to state a Case.

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Appeal by Lefore Holdings Ltd against the refusal of the Divisional Court of the Queen's Bench Division to grant leave to apply for an order of mandamus directed to the justices for the London Borough of Croydon requiring them to state a Case for the opinion of the High Court.

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G. Clarke for the applicants.
S.D. Brown as amicus curiae.

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LAWTON LJ. On October 2, 1979, the applicants applied to the Queen's Bench Divisional Court for leave to apply for a judicial review with the object of obtaining a mandamus against the Croydon justices. That application was refused; the same day, they appealed against the refusal to this court. This court heard that application ex parte and granted leave to apply. We have been informed by counsel for the applicants that on the occasion of the refusal the court directed that the motion in respect of which leave was required should be heard by this court. This court clearly has jurisdiction to hear a motion in those circumstances, having regard to its own decision in *R v Industrial Injuries Comr, ex parte Amalgamated Engineering Union* (1).

The matter arises out of an application for a distress warrant against the applicants in respect of their rateable occupation of some waste ground at the rear of premises in Croydon. The allegation was that they had been in rateable occupation of that waste ground for approximately a year, namely, from September, 1977, to September 1978. The applicants claimed that they had not been in rateable occupation. When the summonses came on for hearing in the magistrates' court at Croydon on October 18, 1978, they appeared by counsel and called evidence to show that they had not been in rateable occupation. We have been informed, and accept for the purposes of this motion, that that evidence was not contested. There was a subsidiary point in the case, namely, if they had been in rateable occupation, when had such occupation come to an end? We have been informed, and it seems to be a fact, that the rating authority accepted that the occupation, if there were any, had come to an end on May 8, 1978, when the National Westminster Bank took over the piece of waste ground as tenants of the London Borough of Croydon.

At the end of the hearing on October 18, 1978, the chairman of the Bench said that it would be necessary to consult their senior clerk who had not been in court when the case was being heard, and as a result the case would be adjourned. The adjournment was until November 22, 1978. On that day the chairman of the Bench announced the finding of the magistrates that the applicants had had, or could have had, beneficial use of the land in question, and that as a result of the concession made by the rating authority the magistrates had decided to issue a distress warrant in the sum of £240.26 together with costs at £3.11. The applicants were aggrieved by that finding, and as a result, by a notice dated December 8, 1978, they applied to the magistrates to state a Case. Their contention, so we have been told, was that the applicants had not at any material time been in possession of land which was of some use, value or benefit to them, and that there was no evidence before the magistrates on which they could so find. Accordingly, so the submission went, there had been no rateable occupation. We have been told, and again we accept for the purposes of this motion, that at the hearing on October 18, the only contested issue was whether the evidence called by the applicants, and not disputed by the rating authority, had shown any rateable occupation. It is against that background that we have to consider the application for a Case to be stated.





The relevant parts of the application are these:

'Now [the applicants] being dissatisfied and aggrieved with your determination upon the hearing of the said information, as being wrong in law, hereby, pursuant to the provisions of the Magistrates Courts Act, 1952, s. 87, apply to you to state and sign a Case setting forth the facts and grounds of such your determination including evidence upon which the justices made their findings of fact for the opinion thereon of the Queen's Bench Division of the High Court of Justice.'

We have been told by counsel for the applicants that whoever drafted that notice did so using a precedent in Oke's Magisterial Formulist (19th edn, 1979, pp 131-132) and the precedent followed was numbered 41. That precedent is not as helpful as the one which is set out in Stone's Justices' Manual (112th edn, 1980, vol 3, p 6174) numbered 194. If the applicants' advisers had followed the precedent no 194 in Stone it is doubtful whether this application would now be before the court.

The time in which the application had to be made, under the provisions of s. 87 of the Magistrates' Courts Act, 1952, as amended by the Criminal Law Act, 1977, was 21 days. That period expired on December 13, 1978. On that day the magistrates' clerk wrote to the applicants' solicitors in these terms:

'Dear Sirs,

'Further to your letter of December 8, enclosing an application to state Case please identify the question or questions of law or jurisdiction on which the opinion of the High Court is sought in accordance with r. 65 of the Magistrates' Courts Rules, 1968.'

That letter seems to have been posted during the Christmas period, and as a result there was some delay in delivery. It was answered on January 10, 1979, in these terms:

'It is our understanding that there was only one major finding of fact, namely, that [the applicants] had beneficial use or could have had beneficial use of the ground in question as a car park and it is that finding of fact which it is claimed cannot be supported by the evidence before the court.'

The clerk to the magistrates seems to have consulted the magistrates and to have given them advice and as a result the magistrates decided that there had not been any proper identification of the issue in the application to state a Case as is required by r. 65 of the Magistrates' Courts Rules, 1968. It was because of that refusal that the applicants applied to the Divisional Court for a judicial review.

The problems which have arisen in this case are as follows. First, was the application dated December 8, 1978, one which complied with s. 87 of the Magistrates' Courts Act, 1952, as amended? Second, did it comply with r. 65 of the 1965 rules? Third, if it did not comply with r. 65, were those rules mandatory or directory? If they were

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mandatory, any defects in the application dated December 8, 1978, could not be rectified. If they were directory and not mandatory, they might, subject to the discretion of the court, be rectified by subsequent addition or amendment.

It is necessary now to look at the terms of the relevant statutes and rules. Section 87 of the Magistrates' Courts Act, 1952, as amended, reads as follows:

'(1) Any person who was a party to any proceeding before a magistrates' court or is aggrieved by the conviction, order, determination or other proceeding of the court may question the proceeding on the ground that it is wrong in law or is in excess of jurisdiction by applying to the justices composing the court to state a Case for the opinion of the High Court on the question of law or jurisdiction involved . . . (2) An application under the preceding subsection shall be made within twenty-one days after the day on which the decision of the magistrates' court was given . . .'

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It is clear, in our judgment, that the provisions of sub-s. (2) are mandatory. There is no power in the Magistrates' Courts Act 1952, to extend the time in which an application can be made. It follows, therefore, that if what purports to be an application in law does not amount to an application no new application can be made after 21 days.

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The first problem, therefore, in this case is whether the application made on December 8, 1978, was an application for the purposes of s. 87 of the 1952 Act. If it were such an application, the next problem is whether it complied with r. 65 of the Magistrates' Courts Rules, 1968, as amended by the Magistrates' Courts (Amendment) (No. 2) Rules, 1975. The 1968 rules dealt with Cases Stated. Rule 65 of those rules was in these terms:

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'An application under s. 87(1) of the [1952] Act shall be made in writing and shall be delivered to the clerk of the magistrates' court whose decision is questioned or sent to him by post.'

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There were difficulties about the application of that rule. Those difficulties arose in this way: applicants for a Case Stated were not bound and in general did not state the point on which they wanted the magistrates to state a Case. This could lead to the magistrates wasting a good deal of effort in reviewing the whole of a case when only one aspect of it was in issue. Secondly, time was wasted by the practice which had existed for many years, up to 1975, whereby normally the applicant for a Case drafted it, submitted it to the respondent, who then either agreed or disagreed with the draft. There was a good deal of coming and going of the draft between the applicant and the respondent, and it was only after the pair of them had agreed the draft that it was sent to the magistrates' clerk for the magistrates' approval. All this took time, and as there were considerable delays in the hearing of applications before the Queen's Bench Divisional Court it was thought that the procedure ought to be made tighter so that these delays could be obviated.

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It is against that background that we come to consider the changes

which were made by the Magistrates' Courts (Amendment) (No. 2) Rules, 1975. Rule 2 provides as follows:

'For rules 65 to 68 of the Magistrates' Courts Rules, 1968, as amended, there shall be substituted the following rules: — "Application to state Case. 65 — (1) An application under s. 87(1) of the Act shall be made in writing and signed by or on behalf of the applicant and shall identify the question or questions of law or jurisdiction on which the opinion of the High Court is sought. (2) Where one of the questions on which the opinion of the High Court is sought is whether there was evidence on which the magistrates' court could come to its decision, the particular finding of fact made by the magistrates' court which it is claimed cannot be supported by the evidence before the magistrates' court shall be specified in such application. (3) Any such application shall be sent to the clerk of the magistrates' court whose decision is questioned"

Then comes r. 65A, and the substance of that rule (which I need not set out in detail) is that for the future magistrates' clerks are to prepare the first draft, and the old practice of letting the applicant prepare the first draft is to come to an end.

One of the problems which arises in this case is whether the provision of r. 65, as amended, are mandatory or directory. Counsel for the applicants has submitted that they are directory. They are essentially procedural; their object is to ensure that justice is done but done quickly, and there is no reason to think that Parliament intended, when approving those rules, that people should be shut out from the seat of justice merely because of some failure to observe one of the technical provisions of the rules.

On the other hand, counsel who has appeared as amicus has called our attention to the fact that in 1975 Parliament approved a change in the existing practice and put in its place a more stringent set of rules, the object of which was to speed up the administration of justice. He submitted, and in my view rightly submitted, that the intention of Parliament must not be overridden by any elasticity which this court, on merely equitable grounds, might seek to apply in circumstances such as arise in this case.

For my part I accept that this court should be chary about relaxing what appear to be the strict provisions of the 1975 rules. Nevertheless, as was pointed out by Lord Penzance many years ago in *Howard v Bodington* (2), the whole scope and purpose of the enactment must be considered and one must assess 'the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act'. Now the 'general object intended to be secured' by the change in the law was the speeding up of justice. It was not to curtail the opportunities for doing justice.

I have to bear in mind that all sorts and manner of persons come before the magistrates' courts; some may be worldly wise, some may

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have the benefit of expert legal advice, some may not be worldly wise; others may have the advice of inexperienced lawyers. It would be a sad state of affairs if, in matters which are mostly penal and often include cases which involve the liberty of the subject, a mere failure to comply with a procedural rule should in all circumstances keep an applicant away from the seat of justice.

It seems to me, therefore, that the scope of these amended rules and, to use the words of *Bodington's* case (2),

'the importance of the provision that has been disregarded, and the relation of that provision to the general object intended' by the change of the rules should be kept in mind. Justice has to be done to applicants who may not be familiar with the technicalities of the law. Each case, of course, has to be looked at on its merits, and in my judgment the court cannot begin to waive the strict provisions of the law unless there has been, to use Templeman J's phrase in *Coney v Choyce* (3), a 'substantial compliance with the regulations'. The problem, therefore, for this court as I see it is to ask whether the application dated 8th December, 1978, complied substantially with r 65 as amended. The rule allows an applicant to raise a question whether there was evidence on which the magistrates' court could come to its decision, and then it goes on:

'the particular finding of fact made by the magistrates' court which it is claimed cannot be supported by the evidence before the magistrates' court shall be specified in such application.'

The problem arises in this case whether the application of 8th December did identify the kind of point on which the magistrates' case was to be founded. It referred specifically to the evidence on which the magistrates made their finding of fact, and that, in my judgment, to a clerk to the magistrates would have indicated at that date that what the applicants wanted to argue in the High Court was that on the only evidence before the magistrates the rating authority had not shown that they were in rateable occupation of this waste land. There could not have been any other question on which the magistrates were being asked to state a Case, because that was the only question at the hearing. In those circumstances, the magistrates were alerted to what was in issue, and they could, without further information, have stated a Case on that application. There were unnecessary words in the application, but once again, the clerk to the magistrates would have appreciated (and I am sure that he did) that those unnecessary words did not take the application any further and would be unlikely to confuse them because there was no issue in the case other than that relating to the evidence about rateable occupation. So there was a substantial compliance, in my judgment, with the rule, and the subsequent events and correspondence clarified the matter for the magistrates. Accordingly, I would hold that the magistrates should be ordered to state a Case.

(2) (1877) 42 JP 6; [1877] 2 PD 203

(3) [1975] 1 All E.R. 979

WALLER LJ: I entirely agree. I would only add this, we are told that at the hearing before the magistrates every fact was agreed except the ingredients of rateable occupation, and the only witness called was a witness called on behalf of the applicants. When the distress warrant was ordered to be issued, they were aggrieved and they served the notice that Lawton, L.J., has already quoted.

The fact that there was only one witness and only one point before the magistrates must have indicated clearly, when the notice was received, what the particular point was, and, indeed, when one looks at the affidavit of the magistrates, there appears this paragraph:

'We appreciated that rateable occupation contained four ingredients, namely, (i) actual occupation or possession; (ii) this must be exclusive to the applicant; (iii) this must also be of value or benefit to the applicant; (iv) the period must not be too transient. Item No. (iv) did not cause difficulty, but we wished to give items (i) to (iii) more detailed consideration than was possible during the time remaining to us on the 18th October and we therefore adjourned the hearing.'

We are told by counsel that items (i) and (ii) were conceded, so there only was the one point, namely item (iii): were they satisfied that it was of value? Indeed, the phrase in Stone's Justices' Manual (12th edn, 1980, vol 2, p 3547) is 'of use or value or benefit to the [applicant]', and accordingly that underlines the point that there could only be one possible interpretation of the notice which Lawton, L.J., has quoted.

Appeal allowed

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Solicitors: *W G R Saunders & Son; Treasury Solicitor.*

Reported by G.F.L. Bridgman Esq., Barrister.

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QUEEN'S BENCH DIVISION
(Lord Lane, C.J., and Lloyd, J.)
February 16, 1981

VEATER v GLENNON AND OTHERS

Magistrates — Recognizances — Binding over to keep the peace — Refusal by defendant to acknowledge himself bound — Powers of magistrate — Magistrates' Courts Act, 1952, s.91.

i

Six youths, aged 14 and 15, reported to the police as behaving in a disorderly manner and at various times carrying sticks, admitted that they had been intending to assault pupils at a neighbouring school. The police arrested them and in due course preferred a complaint against them that they were behaving in a manner whereby a breach of the peace was likely to be occasioned. When the matter came before the magistrates the facts were admitted and the magistrates were minded to bind over each of the youths in his own recognizances of £100 to keep the peace for a year, but when they asked each youth whether he would acknowledge himself bound each refused. The magistrates decided that they could not impose a binding over order effectively unless each youth acknowledged his indebtedness in the amount fixed, and in view of the youths' refusal they were compelled to let them go. On an appeal by the prosecutor to the Divisional Court,

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Held (dismissing the appeal): the magistrates had no power to impose a sentence of imprisonment for failure or refusal to enter into a recognizance in the case of persons under 17, and it was common ground that they had no power to impose any other custodial sentence.

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Per Curiam: The essence of a binding over is that the person bound over acknowledges his indebtedness to the Queen and thereby becomes bound in the sum fixed by the court. The court cannot force such an acknowledgment upon a person behind his back or treat him as being bound when he is not. The court's only remedy where a person refuses to acknowledge his indebtedness and thereby become bound is to put him in prison until he does. It is now far too late to argue that the acknowledgment can be treated as a mere formality which can be dispensed with when occasion demands.

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Case Stated by Bristol justices.

*Black, Q.C., and I. Glen for the appellant, Philip Veater.
I. Bullock for the respondents, Paul Anthony Glennon and Others.*

Lord Lane, C.J.

v

LORD LANE, C.J.: This is the judgment of the court. This is an appeal by way of Case Stated from a decision of the Bristol justices given on July 31, 1980. The facts are very simple. On February 22, 1980, six youths aged 14 and 15, were reported as behaving in a disorderly manner in Park Road, Stapleton, Bristol. When the police arrived on the scene they found two of the youths carrying sticks and a third wearing a stocking mask. All six were arrested and taken to the police station. Subsequently they all made statements in which they admitted that they had been on an expedition with the object of assaulting pupils at a neighbouring school, but had not been able to find them. They had all at some stage been armed with sticks. The police preferred a complaint against them that they were behaving in a manner whereby a breach of the peace was likely to be occasioned contrary to common law.

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When the matter came before the magistrates, the facts were admitted. The magistrates were minded to bind over each of the respondents in his own recognizance of £100 to keep the peace for one year. They asked each of the respondents whether he would acknowledge himself bound, and each refused. The magistrates then heard legal argument as to their powers. They took the view that they could not, in law, impose a binding-over order unilaterally. To be effective each of the respondents had to acknowledge his indebtedness in the amount fixed. So the magistrates asked them all once again whether they would acknowledge their indebtedness. Once again they all refused. The magistrates then found themselves in what they described as a humiliating position. They felt that they had no sanction to secure compliance with their order and that they had no alternative but to let the respondents go, which they did. The question for the court is whether they were right.

Counsel for the appellant, the prosecutor, took two main points. In the first place he argued that the magistrates were wrong to conclude that they had no sanction. They were entitled to send the respondents to prison until they agreed to be bound. Secondly, he argued that the magistrates were in any event entitled to impose a binding-over order unilaterally. Such an order would have had exactly the same effect as if the respondents had acknowledged their indebtedness and entered into their own recognizance in the amount fixed. It is convenient to take each of these points in turn.

By s.91(1) of the Magistrates' Courts Act, 1952, a magistrates' court has power, on a complaint by any person to order a person to enter into a recognizance, with or without sureties, to keep the peace or to be of good behaviour. If the person fails or refuses to comply with the order, then by s.91(3) the court may commit him to prison for a period not exceeding six months, or until he sooner complies. The power under s.91 must be distinguished from the somewhat similar power under the Justices of the Peace Act, 1361. Unlike the powers under the 1952 Act, the powers under the 1361 Act are exercisable by a single justice, and they are exercisable, not by reason of any offence having been committed, but as a measure of preventive justice, that is to say, where the person's conduct is such as to lead the justice to suspect that there may be a breach of the peace, or that he may misbehave: see Blackstone's Commentaries, 16th edition, Book IV, page 251, *Lansbury v. Riley* (1); *The King v. County of London Quarter Sessions* (2); *R. v. Aubrey Fletcher* (3). See also *Everett v. Ribbands* (4) per Denning, L.J. The sanction in the case of a failure or a refusal to enter into a recognizance under the 1361 Act is the same as under the 1952 Act, namely, imprisonment.

By s.19(1) of the Powers of Criminal Courts Act, 1973, Parliament provided that neither the Crown Court nor a magistrates' court should impose imprisonment on a person under 17 years of age. Section 19(4) is a definition section. It provides as follows:

- (1) 77 JP 440; [1914] 3 KB 229
- (2) [1948] 1 KB 670
- (3) 133 JP 450; [1969] W.L.R. 872
- (4) 116 JP 221; [1952] 2 KB 198

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"In this section 'impose imprisonment' means pass a sentence of imprisonment or commit to prison in default of payment of any sum of money, or for want of sufficient distress to satisfy any sum of money, or for failure to do or abstain from doing anything required to be done or left undone."

On the face of it, s.19(1) of the 1973 Act has taken away the power of the magistrate to impose imprisonment on a person under 17 who has failed to enter into a recognizance when required. Counsel for the appellant submits that that is not so. He submits that the powers of magistrates under the 1961 Act are part of their civil jurisdiction and have been left intact by subsequent criminal legislation, including s.19 of the 1973 Act. He argues that Parliament cannot have intended to take away from magistrates their only sanction under the 1961 Act.

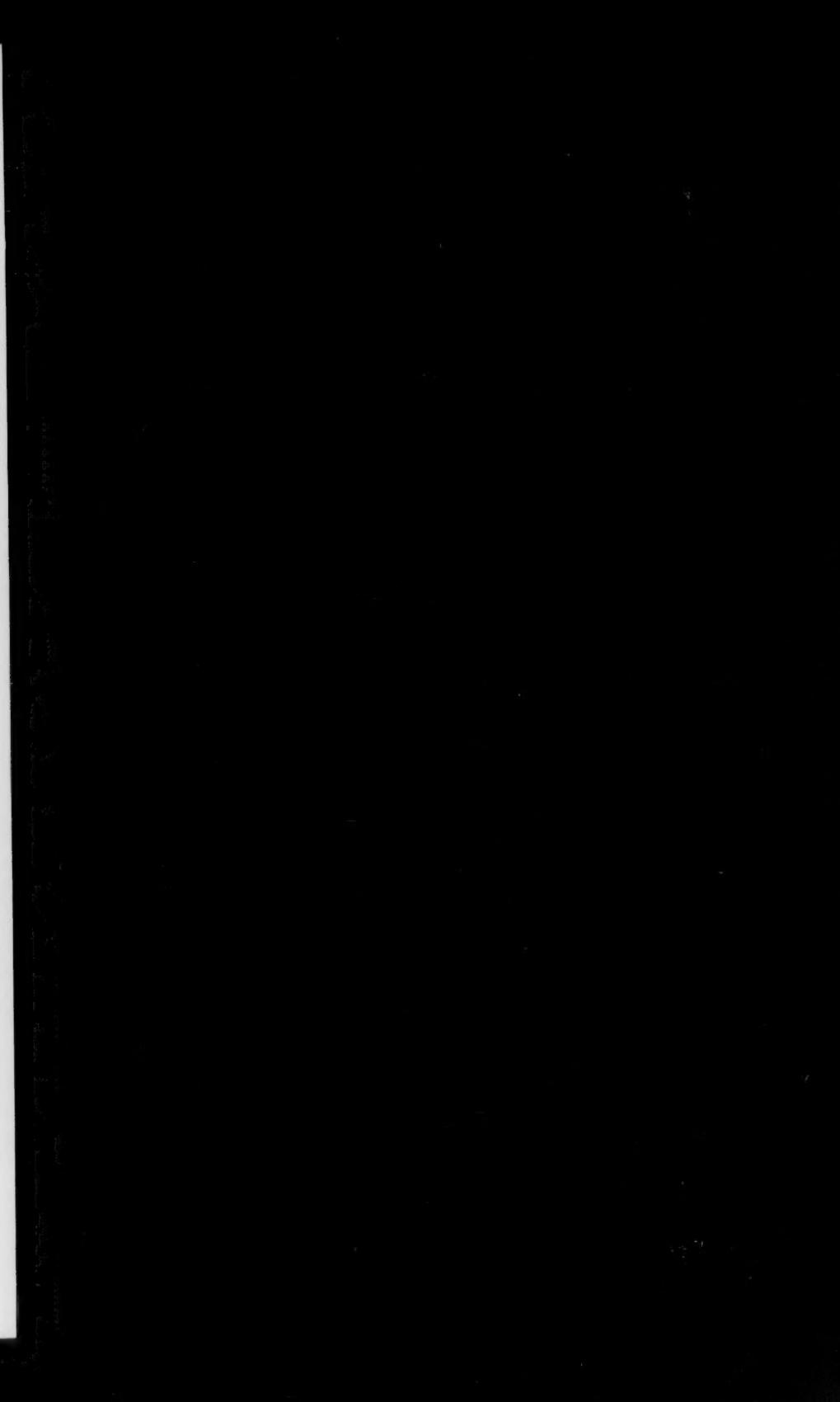
We cannot accept that argument. Even if one assumes that the power of magistrates to bind-over under the 1961 Act is part of their civil, and not their criminal, jurisdiction, we would still hold that the prohibition on imprisonment of persons under 17 years of age applies. The language of s.19(1) of the 1973 Act is clear, comprehensive and imperative. We see no reason to suppose that Parliament intended to make an exception in the case of the magistrates' civil jurisdiction. It would indeed be an odd result if, in the case of persons under 17, Parliament had intended to take away the power to commit under s.91 of the Magistrates' Courts Act, 1952, where an offence had actually been committed, but had left unaffected the power to commit under the 1961 Act where no offence had been committed.

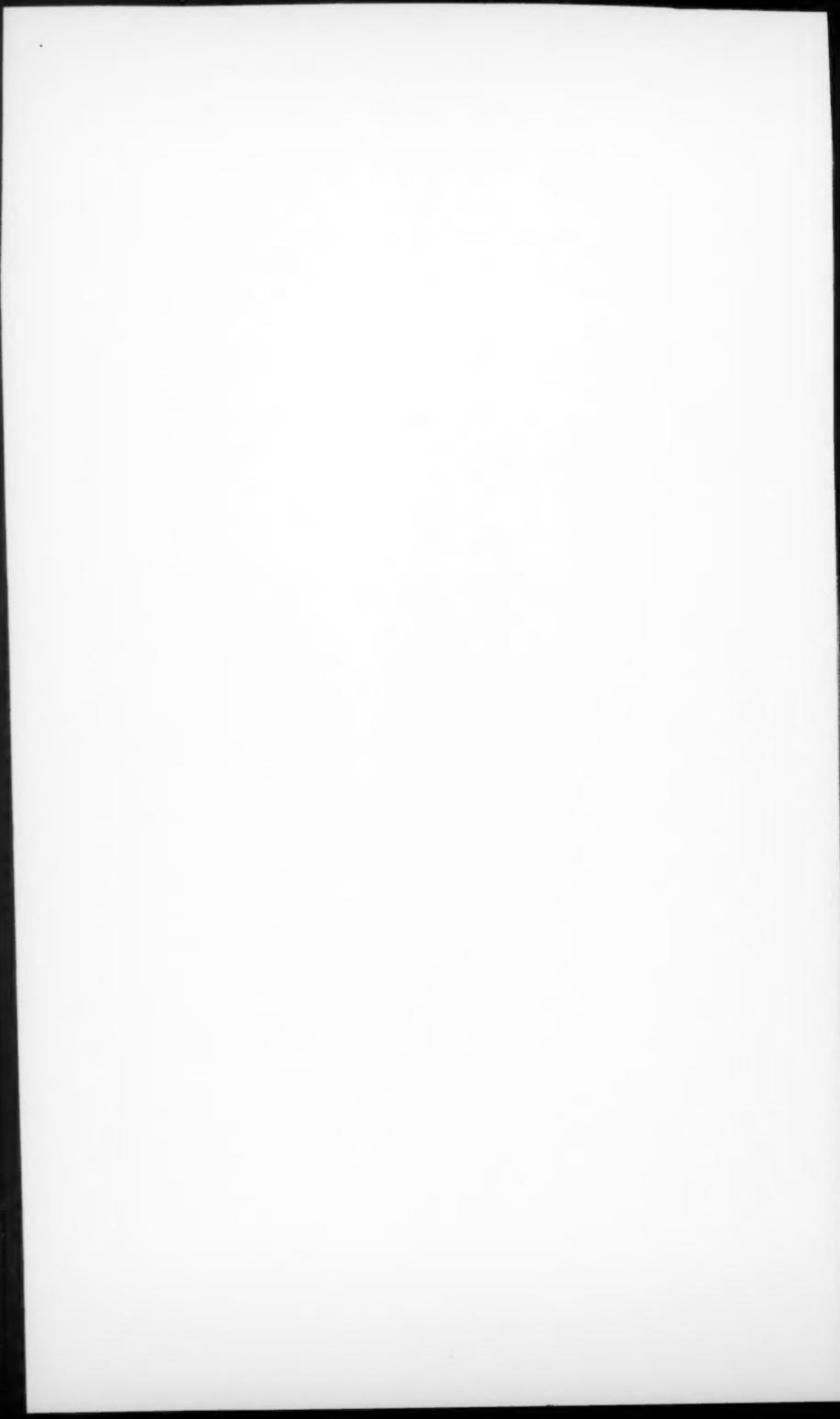
It is therefore unnecessary to decide whether the premise to counsel's argument is correct. At first sight, however, there is much to be said for the view, contrary to his argument, that the power to bindover to keep the peace is part of the magistrates' criminal jurisdiction. Certainly the occasion on which it was exercised in the present case was a criminal proceeding. The case of *R. v. Southampton Justices, ex parte Green* (5) is a very different case. In that case a man was granted bail on terms that he provide sureties. One of his sureties was his wife, who duly entered into a recognizance. The man failed to appear at the committal proceedings, and the justices estreated the wife's recognizance. She applied for leave to move the Divisional Court, but her application was refused. On appeal to the Court of Appeal it was held that the court had jurisdiction, because it was not a criminal cause or matter. The debt created by the recognizance was a civil debt. But in that case there was no question of the exercise of any powers under the 1961 Act. The facts of the case are so removed from the present that it affords no real help.

Counsel for the appellant submitted as a last resort that there had been "failure" to do anything here within s.19(4) of the Act — merely an outright refusal. That is a distinction without a difference. He further relied heavily on a decision of the Court of Appeal in *Morris v. Crown Office* (6). In that case a number of Welsh students created

(5) 139 JP 667; [1976] QB 11

(6) [1970] 2 QB 114





a disturbance in the High Court in the course of a hearing of a libel action. Eleven of them refused to apologise and were sentenced to three months' imprisonment for contempt of court. They were all, save one, under 21. They appealed to the Court of Appeal. There were two points. First, it was said that a sentence of imprisonment should not have been imposed on those under 21 by reason of s.17(2) of the Criminal Justice Act, 1948, which corresponds to s.19(2) of the 1973 Act. The Court of Appeal held that the judge was entitled to take the view that no other method of dealing with the students was appropriate and that the second half of s.17(2) is directory and not mandatory. What was said on that point does not help the appellant.

But there was a second point. It was argued that the sentence of imprisonment, being for only three months, should have been suspended under s.39(3) of the Criminal Justice Act, 1967. It was held by the Court of Appeal that s.39 of the 1967 Act did not apply to a sentence of imprisonment for contempt. Davies, L.J., said:

"What may loosely be called the criminal law statutes apply in my view to the ordinary process of criminal prosecution, whether in a court of summary jurisdiction or at assizes or quarter sessions. Quite apart from the difficulty, to which my Lord averted, in the way of enforcing a suspended sentence, if such were passed for a criminal contempt, there are a number of provisions in the criminal law statutes, as I am calling them, which obviously have no application whatsoever to proceedings for contempt. Take probation: it would be quite impossible, I think for a judge dealing with a case of contempt to make a probation order. Yet such a course is possible in all criminal cases. I cannot see for myself that it would be possible for the judge committing for contempt to send the offender, if he were of the appropriate age, to a detention centre. What it comes to, in my mind, is that the code — the procedure, if that is the apt expression — is entirely different in cases of criminal contempt from that which applies in ordinary criminal cases."

Salmon, L.J., said:

"This power to commit for what is inappropriately called 'contempt of court' is *sui generis* and has from time immemorial reposed in the judge for the protection of the public. Although the point is by no means free from difficulty, I agree with my Lords that Parliament cannot be taken to have intended that this power should be fettered by the Criminal Justice Acts of 1948 and 1967. To my mind it is plain that Parliament never intended these Acts to apply to proceedings such as these. For one thing, the Act of 1967 supplied no machinery whereby a suspended sentence for contempt of court could ever be made effective if the culprit repeated his offence. Therefore the point that the judge's power was limited by s.39(3) of the Act of 1967 to imposing only suspended sentences fails."

Counsel for the appellant argued that by the same process of reasoning the "criminal law statutes" do not apply to the power of

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magistrates to commit to prison for refusal to enter into a recognizance under the 1361 Act. There are two reasons why we cannot accept that argument. In the first place the Court of Appeal clearly regarded the power to commit for contempt as *sui generis*: see the successful argument of Sir Elwyn Jones and the judgment of Salmon, L.J. If the powers of the court in the case of contempt are indeed *sui generis*, it follows that they cannot provide any useful analogy in any other case. The powers of the justices under the 1361 Act may also be regarded as *sui generis*. But that does not make them *eiusdem generis*. Secondly, the ratio of Lord Denning's judgment (with which Davies, L.J., agreed) is the quite narrow ground that the 1967 Act, read as a whole, does not contain any provision for giving effect to a suspended sentence in the case of contempt. Therefore s.39 cannot have been intended to apply to such a case. There is nothing in s.19 of the 1973 Act, or anywhere else, which makes it inapplicable to the power of justices to commit under the 1361 Act.

For the reasons which we have given we hold that the magistrates have no power to impose a sentence of imprisonment for failure or refusal to enter into a recognizance in the case of persons under 17.

We note in passing that in *R. v. Greenwich Justices, ex parte Carter* (7) the Divisional Court seems to have assumed that the magistrates would likewise have no power to impose a sentence of imprisonment on a person under 17 for failing to comply with a witness summons.

It was common ground that the magistrates had no power to impose any other custodial sentence. The reason is that the power to order a person under 21 to be detained in a detention centre or remand home is purely statutory. By s.4 of the Criminal Justice Act, 1961, the court is given power to make a detention order in the case of a person under 21 in lieu of passing a sentence of imprisonment, but it only applies in the case of "an offender", which these persons, *ex hypothesi*, were not. Moreover, by s.38(1) a "sentence" is defined as excluding committal for default which is in turn defined by s.39(1) as including a failure to do anything required to be done. So it is clear that detention in a detention centre or remand home is not available as an alternative sanction in the case of a failure by a person under 17 to enter into a recognizance.

We now turn to the second main submission by counsel for the appellant. Were the magistrates entitled to impose a binding-over order unilaterally? At first sight there is much to be said for the view that an order that a person be bound-over to keep the peace or to be of good behaviour is like any other order imposed by a court. To suggest that such an order requires consent before it is effective is almost a contradiction in terms. Moreover, a consent which can be compelled, in the case of a person over 17, by the threat of imprisonment, is hardly the sort of consent which, in other circumstances, the court looks on with favour. But counsel has taken us through the whole history of the matter, starting with Dalton's *Courtney Justice*, described by Lord Goddard in *The King v. County of London Quarter Sessions* (2) as a work of the highest authority. As a result we have

been convinced, first, that the essence of a binding-over is that the person bound-over acknowledges his indebtedness to the Queen and thereby becomes bound in the sum fixed by the court, and, secondly, that the court cannot, as it were, force such an acknowledgment upon a person behind his back or treat him as being bound when he is not. The court's only remedy where a person refuses to acknowledge his indebtedness, and thereby become bound, is to put him in prison until he does.

The process of binding-over to keep the peace is described in Dalton's Country Justice at p.262 as follows:

"Surety for the peace, is the acknowledging of a recognizance (or bond) to the King (taken by a competent judge of record) for the keeping of the peace; And it is called surety, of the word securitas, because the party that was in fear, is thereby the more secure and safe."

From this, and subsequent passages, it appears that the "security" offered by the process of binding-over consists in the recognizance, or bond, entered into either by the principal or by his sureties or both. In Blackstone's Commentaries, (16th edn, p.252), there is this passage:

"This security consists in being bound, with one or more sureties in a recognizance or obligation to the King, entered on record, and taken in some court and by some judicial officer; whereby the parties acknowledge themselves to be indebted to the Crown in the sum required, (for instance £100) with condition to be void and of none effect, if the party shall appear in court on such a day, and in the meantime shall keep the peace; either generally, towards the King, and all his liege people; or particularly also, with regard to the person who craves the security."

Then at page 253:

"Wives may demand (such security) against their husbands; or husbands, if necessary, against their wives. But feme coverts, and infants under age, ought to find security by their friends only, and not to be bound themselves: for they are incapable of engaging themselves to answer any debt; which, as we observed is the nature of these recognizances or acknowledgments."

A similar point is made in Hawkins Pleas of the Crown, p.254, as follows:

"But infants and feme coverts ought to find security by their friends, and not to be bound themselves."

These last passages seem to us particularly significant, for they show that the essential element in the process of binding-over is that the person binds himself. If the court could impose an obligation to be bound, then there would be no difference between the case of feme coverts and infants and any other case.

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There is nothing in any of the books to which we were referred which suggests that justices have any power to impose an obligation to be bound, except indirectly by threatening imprisonment. If they have such a power, then it seems strange that the much more drastic sanction of imprisonment should have become so firmly rooted in our law at such an early stage. The form of recognition into which a person is required to enter has remained in substantially the same language for centuries. By that language the person acknowledges that he is indebted to the Queen in the sum fixed. In our judgment, it is now far too late to argue that the acknowledgement can be treated as a mere formality, which can be dispensed with when occasion demands. Acknowledgement of the indebtedness is an essential ingredient in the binding-over process. We would, therefore, reject counsel's second main submission.

That disposes of the present appeal. Though we have every sympathy with the magistrates in the position in which they found themselves, they reached the right conclusion in law. The appeal is accordingly dismissed. We would add this. It is clear from what we have said that the law is in an unsatisfactory state. The magistrates should not be left powerless as they are.

Solicitors: *Prosecuting Solicitor, Avon & Somerset Police Authority, Bristol; Gerald Davey & Co., Bristol.*

Reported by G.F.L. Bridgman, Esq., Barrister.

COURT OF APPEAL
(Lord Lane, C.J., Stocker, J., and Glidewell, J.)
October 24, 1980

Att. Gen's Ref.
(No. 1 of 1980)

Court of Appeal

ATTORNEY-GENERAL'S REFERENCE (No. 1 of 1980)

Criminal Law – Falsification of document required for accounting purpose – Proposal form addressed to finance company – Theft Act, 1968, s.17(1)(a).

i

The defendant was engaged at the material time in selling domestic appliances to householders to some of whom he gave personal loan proposal forms addressed to a finance company to enable them to borrow money from the finance company to pay for the appliances. To secure the acceptance of the proposals by the finance company he advised certain of the householders to give false particulars in their proposal forms, e.g. that they had no outstanding hire-purchase instalment commitments when they had such commitments, or in another case that the householder had a Savings Bank account, which was untrue. The false information supplied by the householders was used by the finance company to make up its accounts on a computer. The defendant was charged in two counts with offences under s.17(1)(a) of the Theft Act, 1968, alleging that he dishonestly, with a view to gain for himself or another, or with intent to cause loss to another, had falsified documents made or required for an accounting purpose. The trial judge ruled that when the proposal forms were falsified they were not documents made or required for an accounting purpose and directed the jury to acquit the defendant. On a reference by the Attorney-General,

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Held: a document might fall within the ambit of s.17(1)(a) if it was made for some purpose other than an accounting purpose, but was required for an accounting purpose as a subsidiary consideration; in the present case the borrower would be making the document for the purpose of his loan proposal being considered whereas at the same time the document might be required by the finance company for an accounting purpose, and it could be said that the document was so required when the proposal might on consideration be rejected by the company; the trial judge was wrong in the conclusions he reached; in a case of this sort much would turn on the precise nature and content of the proposal form in question and if the form in question which had been falsified was materially different from that in the present case the answer of the court might well be different.

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Reference by Attorney-General under s.36 of the Criminal Justice Act, 1972.

v

D. Tudor Price for the Attorney-General.
D. Jeffreys as amicus curiae.

Cur adv vult

24th October, 1980. LORD LANE, C.J., read the following judgment of the court: This is a reference by the Attorney-General under the provisions of s.36 of the Criminal Justice Act, 1972. The reference is in these terms:

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'Whether a person who dishonestly falsifies a personal loan proposal form in material particulars which he sends thereafter to a

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finance company and which they use in their accounting process, falsifies a document "required for any accounting purpose" contrary to s.17(1)(a) of the Theft Act, 1968.'

Court of Appeal

Lord Lane, C.J. The facts of the case are as follows. The accused man was engaged at the material times in selling domestic appliances to householders. For that purpose, he gave to householders personal loan proposal forms addressed to a finance company to enable the householders to borrow money to pay for the appliances. So that the proposals would be accepted by the finance company, he advised some of the householders to give false particulars on their proposal forms. Two examples were proved. In the first, the householder, at the suggestion of the accused, understated the number of his dependants and falsely stated that he had no outstanding instalment commitments. In the second, the householder was induced by the accused man similarly to underestimate the number of his dependants and to state falsely that he had a National Savings Bank account.

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The proposal forms when received by the finance company were considered and accepted. The information set out on the reverse side of the forms was used by the company to make up its accounts on a computer. The relevant forms were exhibited at the trial and were similar to each other. They are headed with the name of the finance company and are entitled 'Personal Loan Proposal Form'. There then follows a section entitled 'Particulars of Proposer', the particulars to be supplied including the name and address of the proposer, his nationality, personal details of his marital and family circumstances, including the number of his dependants, his employer's name and address and other personal details. Also included in this section on the form is a space in which the proposer is required to state the details of any hire-purchase commitments then existing. It was this section of the form which contained the false answers in the present case. The next section requires details of the house in which the equipment is to be installed, including any relevant mortgage details. Finally, the form on its face contains a section 'For office use only' in which the finance company would enter the details needed to be fed into their computer. At the bottom is a space designated 'Signature of witness'. At the head of the reverse side of the forms is a request signed by the proposer and addressed to the finance company requesting the loan 'for the purpose described below' and certifying the truth of the particulars given. Beneath this request is a section in which the purpose for which the loan is required is stated. Then there follow details of the cash price of the equipment and the amount of the initial payment, the amount of the advance, the interest charged, and the total sum due, and the number of the monthly instalments by which the loan is to be paid and the amount repayable on each instalment. Finally, there are blank forms for direct debit authority and a promissory note.

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The accused was charged in four counts. Two of these are immaterial to this reference. The remaining two give rise to the question posed in this reference; they were in similar terms and each charged the accused with an offence under s.17(1)(a) of the Theft Act 1968. The particulars of each count allege that he had dishonestly, with a view to gain for himself or his company, falsified the personal loan proposal form

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specified, being a document required for the accounts of the finance company.

The trial judge ruled that the proposal form was used for an accounting purpose when the loan had been accepted by the finance company, but that at the time that it was falsified it was not 'made or required for any accounting purpose' within the meaning of the section.

The question at issue is therefore whether or not the proposal forms were documents required for an accounting purpose within the meaning of s.17(1)(a). The relevant parts of the section read as follows:

'Where a person dishonestly, with a view to gain for himself or another or with intent to cause loss to another — (a) . . . falsifies any . . . document made or required for any accounting purpose . . .'

The judge ruled that the proposal forms in question were not documents made or required for an accounting purpose and expressed his ruling in the following terms:

I find it a great help, as always, to look at the document itself and it is headed "Personal Loan Proposal Form", and then there are set out particulars of the proposer and it is those particulars which are alleged to be false in this case. It is true that over the page the purpose for which the loan is required is stated, the amount of the loan, the amount of the interest, and the amount of the monthly instalments are all set out, but the point is made broadly that on the face of it this document is not made or required for an accounting purpose. If the proposal were accepted (and it was in this case), there was evidence for the jury that the proposal form was used for an accounting purpose because once the proposal form is accepted, various parts of the form are filled up on the front of the form and it is used for what the witness called "computer input". So undoubtedly if the proposal is accepted the form is used for an accounting purpose and material is put on the face of the form . . . Right until the moment that the proposal is accepted, the borrower would be under no duty whatever to account; that would only arise after the proposal were accepted. In my opinion it would be a misuse of the words of the statute to refer to it as a document made or required for any accounting purpose. In my view the highest that the evidence goes is that this document was for use in an accounting process, but there was no duty of any sort to account until after the proposal was accepted and ceased to be a proposal . . . I have come to the conclusion that there is no evidence on which a jury could find that this was a document made or required for any accounting purpose.'

The judge based his conclusion, so it seems, on two grounds: (i) that the document was not required for an accounting purpose until after it had been received and considered by the finance company and after the decision had been reached to grant a loan; and (ii) that there was no duty to account until after this decision had been made.

As to the second ground, it does not seem to us that the moment at which any duty to account arose had any relevance to the question of

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Att. Gen's Ref. whether the document was or was not required for an accounting purpose.
(No. 1 of 1980)

Court of Appeal As to the first ground, it is to be observed that s.17(1)(a) in using the words 'made or required' indicates that there is a distinction to be drawn between a document made specifically for the purpose of accounting and one made for some other purpose but which is required for an accounting purpose. Thus it is apparent that a document may fall within the ambit of the section if it is made for some purpose other than an accounting purpose but is required for an accounting purpose as a subsidiary consideration.

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In the present circumstances the borrower would be making the document for the purpose of his loan proposal being considered, whereas, at the same time, the document might be 'required' by the finance company for an accounting purpose. Can it be said that the document is so required when the proposal may on consideration by the company be rejected? We think it can. The purpose, or at any rate one of the purposes, of the figures on the reverse side of the form was in due course to provide the necessary information for the computer.

The fact that the necessity might not arise in the event does not, it seems to us, mean that the information was not required in the first instance for the eventual accounting purpose. One can imagine the conversation: 'What do you need this for?' Answer: 'We need it for our computer accounting system in the event of the proposal being accepted.'

For these reasons we think that the learned judge was wrong in the conclusions which he reached.

The other point argued before us was this: that the part of the form which was falsified (that is the obverse side) was not in any way required for an accounting purpose. It was only the reverse side which was material for accounting, and consequently no offence was committed. We do not think that the words of the section permit of that interpretation. This was one entire document; it was as to part required for an accounting purpose; it was as to part falsified. The fact that these two parts were not the same does not exonerate the man who was responsible for the falsification. Indeed, the reverse side containing the figures also carries the borrower's signature and declaration.

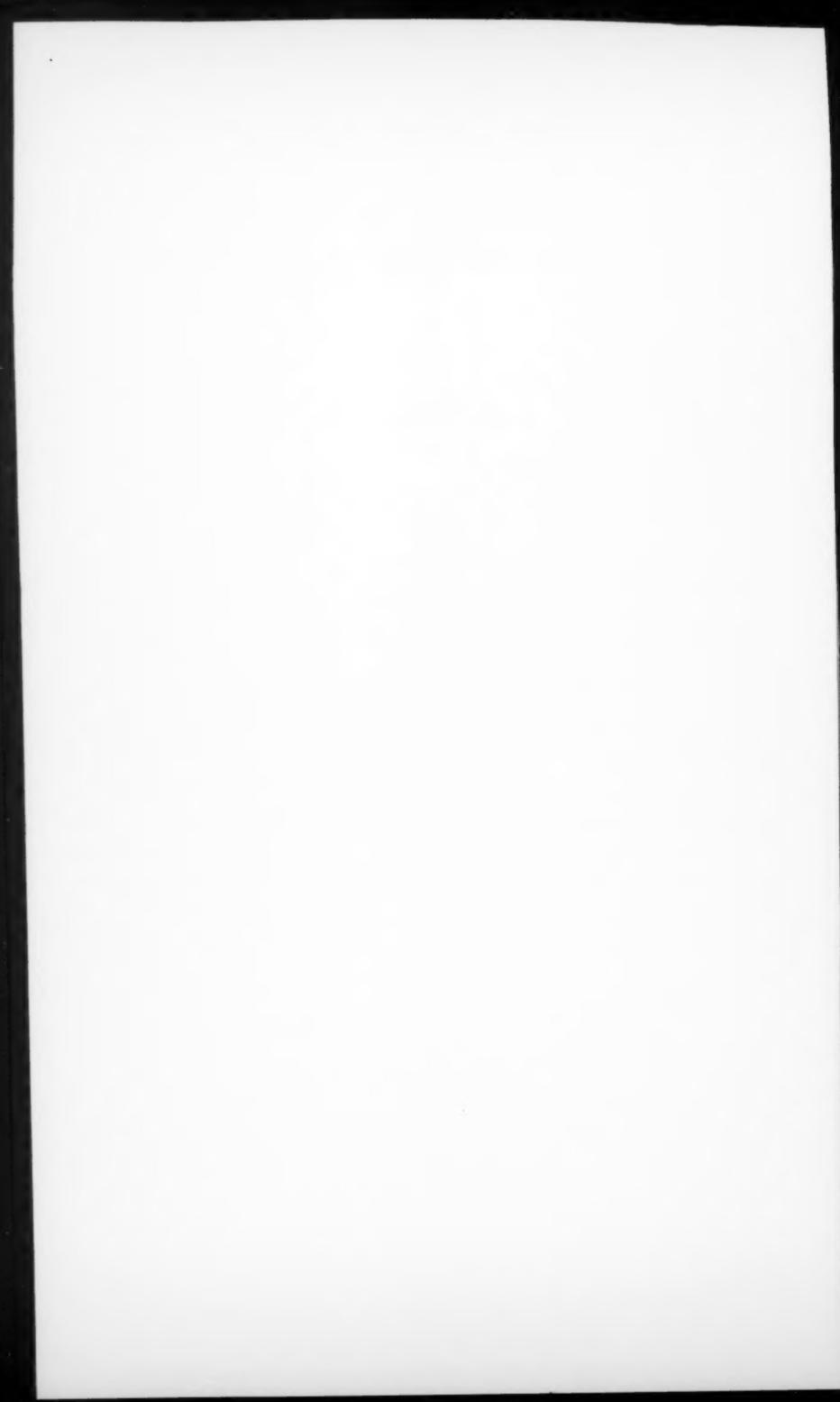
We were referred to *R v Mallett* (1), but the question we have to decide was not debated in that case and we do not think the judgment helps our decision.

It follows from what we have said that much will turn in a case of this sort on the precise nature and content of the proposal form in question. In giving the answer Yes to the question posed in the Attorney-General's reference, we add the proviso that the answer might well be different were the form which has been falsified to be materially different from that which we are considering here.

Solicitors: Director of Public Prosecutions; Treasury Solicitor.

Reported by G.F.L. Bridgman, Esq., Barrister.





COURT OF APPEAL
(Lord Lane, C. J., Stocker, J., and Glidewell, J.)
October 24, 1980
ATTORNEY-GENERAL'S REFERENCE (NO 2 OF 1980)

Att. Gen's Ref.
(No. 2 of 1980)

Court of Appeal
Stocker, J.

*Criminal Law – Forgery – Document to be used in court of record
– Document made evidence by law – Document put in evidence
in magistrates' court – Forgery Act, 1913, s.3(3) (g), s.6(1).*

By s.3(3) of the Forgery Act, 1913: "Forgery of the following documents, if committed with intent to defraud or deceive, shall be a felony . . . s.3(3) (g), s.6(1).

At a trial in a magistrates' court a statement pursuant to s.91 of the Criminal Justice Act, 1967, was put in evidence by the police officer in charge of the prosecution which purported to have been made and signed by the defendant in the case, but had in fact been made and signed by the police officer who tendered it. At the trial of the police officer under s.3(3)(g), and s.6(1) of the Forgery Act, 1913, the judge held that there was no case to go to the jury because at the time the statement was forged by the accused it was no more than a witness statement made by the witness or purporting to be such a statement.

Held: on its proper construction s.3(3)(g), was concerned with documents which, if made and tendered in accordance with the provisions and conditions of the relevant Act, became documents "made evidence by law" and the forgery of that class of documents was the subject-matter of the sub-section; "document which is made evidence by law" was descriptive of a class of document and was not descriptive of the moment when its reception in evidence rendered it "evidence"; the ruling of the judge was wrong: a person who, with intent to deceive, forged a written statement which was later tendered to a magistrates' court under s.9 of the Criminal Justice Act, 1967, committed an offence under s.3(3)(g) of the Forgery Act, 1913, of forging a document which was made evidence by law, and a person who knowingly handed such a document to the court committed the offence of uttering under s.6(1).

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Reference by the Attorney-General under s.36 of the Criminal Justice Act, 1972, asking for the opinion of the Court of Appeal on two points of law under the Forgery Act 1913.

*D Tudor Price for the Attorney-General.
P Digney for the respondent.*

v

Cur adv vult

24th October, 1980. STOCKER, J., read the following judgment of the court: This is a reference by the Attorney-General under the provisions of s.36 of the Criminal Justice Act, 1972, a proceeding whereby the Attorney-General can institute steps for the testing of a direction on a principle of law decided in the Crown Court which seems to have been wrongly decided and which may be in danger of reproduction in later cases if not corrected. This case concerns the tendering as evidence at the trial of an accused person before a magistrates'

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court of a statement pursuant to s.9 of the Criminal Justice Act, 1967. The statement had not been made or signed by the person by whom it was purported to have been made and signed but had been written and signed by the police officer tendering it. The judge at the trial of that officer for forgery and uttering a forged document ruled that there was no case to go to the jury under s.3(3)(g) of the Forgery Act, 1913, since the document only became evidence when tendered to the court and at the time of the forgery had not achieved the status of 'a document which is made evidence by law' and ruled that accordingly there was no evidence under s.6(1) that a forged document had been uttered. The point of law which this court has been asked to decide has been stated in the reference in the following terms: (a) whether a person who with intent to deceive forges a written statement which is later tendered to a magistrates' court under s.9 of the Criminal Justice Act, 1967, commits an offence under s.3(3)(g) of the Forgery Act, 1913, of forging a document which is made evidence by law; (b) whether a person who knowingly hands to the court a forged written statement which he is tendering under s.9 of the Criminal Justice Act, 1967, commits an offence under s.6(1) of the Forgery Act, 1913, of uttering a forged document which is made evidence by law.

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The facts as set out in the reference are as follows: (i) The accused man who was a police officer was in charge of a summary prosecution. (ii) At the hearing of this prosecution in open court he handed to the clerk of the court a written statement which he was tendering under the provisions of s.9 of the Criminal Justice Act, 1967, with the consent of the defence. (iii) The Court received the statement in evidence. (iv) The accused later admitted that the purported witness had neither made the statement nor signed it. (v) The matters contained in the statement were capable of proof by two witnesses, but the accused stated that because he had forgotten to approach them by the date of the trial he wrote the purported statement to cover up his omission. The police officer concerned was charged on an indictment containing two counts: (i) forgery contrary to s.3(3)(g) of the Forgery Act, 1913; (ii) uttering such document contrary to s.6(1) thereof.

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The 1913 Act, by s.3(3), makes it an offence to forge 'the following documents . . . with intent to defraud or deceive . . . (g) . . . any document which is made evidence by law . . .' It was not disputed that the document tendered, if genuine, was properly admitted in evidence in accordance with s.9 of the Criminal Justice Act, 1967, which states:

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'(1) In any criminal proceedings . . . a written statement by any person shall, if such of the conditions mentioned in the next following subsection as are applicable are satisfied, be admissible as evidence to the like effect by that person.'

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It is unnecessary for the purpose of this judgment to recite in detail the conditions referred to in sub-s (1) save to observe that sub-s (2) states the form and necessary contents of the statement and requires that before the hearing at which it is tendered a copy shall be served on each of the other parties to the proceedings and that no objection to its being tendered in evidence is received from any party within seven days. Subsection (3) sets out further procedural requirements which

must be fulfilled before that statement can be admitted. Subsection (4) confers power on parties to the proceedings or the court of its own motion to require the person who made the statement to give oral evidence notwithstanding that the statement is admissible in evidence, all requirements having been fulfilled.

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The judge's ruling was in these terms:

'What was the nature of that written statement at the time it was so falsely, on the evidence, and dishonestly prepared or forged by the accused? At this stage it was no more than a witness statement, or purported to be a witness statement made by the witness. At the time it was forged it was not, on any view, a document made evidence by law.'

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The judge continued later:

'When was the uttering? In my view it must be, at the latest, the tendering of the statement to be used in evidence. It is right that it was subsequently read, but that was the administrative process of dealing with it after it had been accepted in evidence. At the moment it was not a document made evidence by law and it could not be until it had been accepted in evidence.'

ii

Counsel for the respondent in his submissions to this court supported the part of the judge's ruling quoted above on the same grounds that he had advanced to the trial judge when advocating such a ruling.

iii

His first submission was that s.9 of the 1967 Act did not make the document itself evidence but only its contents and that properly construed the words in s.9(1) 'shall be admissible to the like extent as oral evidence to the like effect by that person' meant that the document was the medium through which the evidence of the matter contained in the statement would be put before the court. He supported this construction of the section by the contention that in practice statements under s.9 were not put in evidence but were read either wholly or in part to the court. This court, while accepting that the reading of statements rather than their being put in evidence as documents may be common practice in the Crown Court, doubts whether in the magistrates' court this is a universal practice. In any event, such practice does not assist in the construction of s.9 of the 1967 Act, the wording of which states in terms which seem unequivocal, 'a written statement by a person. . . . shall be admissible as evidence'. The trial judge rejected counsel's contention and held that the written statement itself was made evidence by the Act. We agree with this part of his ruling and do not propose further to consider it.

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Counsel's second submission, which was accepted as correct by the trial judge and is the basis of his ruling the correctness of which this court has been asked to consider, was that the document itself when made and forged was not at that stage evidence at all or admissible as such. It becomes evidence under the Act if, and only if, the requirements of s.9(2), (3) and (4) of the 1967 Act have been complied with and the document had been tendered to the court as evidence. He argued that until these requirements were fulfilled, the document was simply a document and not evidence at all, either under the Criminal

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Justice Act, 1967, or in any other sense, and thus could not be the subject of forgery under s.3(3)(g), of the Forgery Act, 1913, since it was not at the time at which the 'forgery' took place a document 'made evidence by law'. In support of this submission he sought to draw a distinction between certain classes of documents made evidence under certain other statutes and statements tendered under the 1967 Act. It is manifest that in 1913 when the Forgery Act became law, statements under s.9 of the Criminal Justice Act, 1967, could not have been in contemplation, and he sought to argue that the documents which at that date might have been tendered, which were the subject-matter of s.3(3)(g), were documents which the relevant statutes relating to them made 'evidence' in the sense that they were themselves evidence at all stages and did not require any conditions to be fulfilled as a prerequisite of their admissibility. He submitted that the proper formula to apply in reaching the decision whether a document was or was not 'evidence' for the purpose of s.9 of the Criminal Justice Act, 1967, and, if forged, for the purpose of conviction under s.3(3)(g) of the Forgery Act, 1913, was: does anything remain to be done before the document can be admitted in evidence?

He submitted that documents made evidence by statute prior to 1913, which were accordingly documents 'made evidence by law', had the characteristic that nothing remained to be done to render them admissible. He cited a number of Acts and documents made evidence under them such as s. 1 of the Evidence Act, 1845, s. 7 of the Evidence Act, 1851, and such documents as the Official Gazette which were themselves evidence of the proclamation, order or regulations published therein. His contention was that the definition of documents 'made evidence by law' for the purpose of s.3(3)(g) of the Forgery Act, 1913, was confined to such documents and excluded documents which were admissible only on the performance of certain conditions, for the reason already stated that, at the time they were forged, they were no more than statements and had no status as evidence.

In our view the judge's ruling and the arguments advanced in support of it are erroneous and should be rejected. We accept that there are classes of documents which by statute are themselves 'evidence' proving the facts contained in them on production without further formality, such as certificates of birth or marriage (covered by s. 3(2)(a) of the 1913 Act), Queen's Printers' copies of statutes, or other official orders, but these, too, in our view become 'evidence' only when tendered as such to the appropriate court or other tribunal. If the judge's ruling and counsel's argument in support of it are correct, even this class of document would not be capable of being forged until tendered in evidence (subject to specific statutory enactments regarding this). Nor do we accept as valid counsel's formula that documents within the ambit of s. 3(3)(g) are confined to documents which require nothing further to be done before they can be admitted, since, for example, the Bankers' Books Evidence Act, 1879, which renders a copy of an entry in a banker's book receivable as evidence, prescribes a number of requirements and formalities to be fulfilled before an entry in a banker's book is so receivable, with the consequence that, if the judge's ruling and counsel's argument are correct, no false copy of such entry would support a conviction under s. 3(3)(g) of the 1913 Act until it was

tendered in evidence, nor could it be uttered until after it was so received. We cite these examples in support of our view that the judge's ruling renders impossible in every or almost every case any conviction under s. 3(3)(g) of the Forgery Act, 1913, unless the forgery takes place after the document is received as evidence.

This rather startling consequence is not necessarily conclusive of the point in issue but in our view stems from a misconstruction of the meaning of the word 'evidence' in s. 3(3) of the 1913 Act. In our view no 'evidence' can exist, be it documentary, oral or in the form of an exhibit, until it is received as such in proceedings in which it is evidence of the fact then in issue. It seems contrary to the manifest intention of the 1913 Act to confine offences under s. 3(3)(g) to documents after they have become evidence in that sense. We think it so improbable that the draftsman of s. 3(3)(g) of the 1913 Act had in mind that the subject-matter of that section should be forgery after the document had been tendered in evidence that any conclusion which confines the subject-matter of this section to that situation can be regarded as fanciful. On this basis the judge's ruling would for practical purposes deprive this subsection of all subject-matter.

In our judgment, on its proper construction, s. 3(3)(g) is concerned with documents which, if made and tendered in accordance with the provisions and conditions of the relevant Act become documents 'made evidence by law' and it is the forgery of such class of documents which is the subject-matter of this subsection. Thus the phrase 'document which is made evidence by law' is descriptive of a class of document, and is not descriptive of the moment when its reception in evidence renders it 'evidence'. Consequently any person commits an offence under s. 3(3)(g) of the Forgery Act, 1913, if he, with intent to defraud or deceive, forges any document which, if made and tendered in evidence in accordance with the terms and conditions of the relevant statute relating thereto, will become a document made evidence by law. For these reasons, in our view, the ruling of the judge on this point was wrong and we would answer each question posed in the reference in the affirmative and will so advise the Attorney-General.

Solicitors: *Director of Public Prosecutions; Bertram White & Co,*
Epsom.

Reported by G.F.L. Bridgman, Esq., Barrister.

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QUEEN'S BENCH DIVISION
(Donaldson, L.J., and Forbes, J.)
January 14, 1981

R. v. GUILDFORD JUSTICES. EX PARTE HARDING

Magistrates — Retirement of clerk with magistrates — Need to avoid appearance that clerk taking part in decision on fact — Advice on standard of proof of offence.

i

The applicant appeared before justices charged with driving a motor vehicle without due care and attention. After evidence had been given and counsel had addressed the justices thereon the justices retired, the chairman requesting their clerk to accompany them and to take with him the notes of the evidence which he had taken. The clerk was in retirement with the justices for some 15 minutes. In an affidavit the chairman stated that the reasons for so proceeding was so that they might have to hand the clerk's advice to ensure that they applied the correct standard of proof and that they might have the benefit of the notes of the evidence which he had taken. The justices convicted the applicant, who applied for an order of judicial review quashing that decision.

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Held: justices were entitled to be advised by their clerk on questions of law but not on questions of fact; it was of paramount importance not only that justice should be done but also that it should be seen to be done and there must be nothing which might lead an observer to conclude that the clerk was taking part in decisions on fact; knowing the standard of proof which applied in all criminal cases, with certain immaterial exceptions, was fundamental to the discharge of a justices' duty, and there was nothing in the offence of driving without due care and attention which gave rise to any special test as any justice of any experience would know; the decisions of the justices would be quashed.

Practice Note [1953] 2 All E.R. 1306 referred to.

iii

Application for order of judicial review quashing a decision of Guildford justices.

iv

N Seed for the applicant, William John Harding.
The respondents did not appear.

Donaldson, L.J.

DONALDSON, L.J.: In this case Mr. William John Harding applies for an order of judicial review quashing a decision of the Guildford justices on the 12th June, 1980, convicting him of the offence of driving without due care and attention.

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What happened was this. Evidence was given for the prosecution by a police officer and by the defendant and his wife. At the conclusion of the case counsel who appeared for Mr. Harding addressed the court on the evidence and made no submission on the law. This was not surprising because in the ordinary course of events no question of law arises on a charge of driving without due care and attention. The magistrates then retired, and the chairman of the Bench asked the justices' clerk to accompany them and to take his notes with him. The retirement lasted for approximately fifteen minutes and the clerk was absent from court and in attendance upon the justices for the whole duration of the retirement.

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On their return the chairman of the justices announced that they

had considered the evidence most carefully, and he then added that it was because they had been considering the evidence most carefully that they had asked the clerk to accompany them with his notes as the clerk sometimes recalled things that the magistrates had missed. I infer from that that it is not unusual, and is perhaps the universal practice of these justices, at all events when that particular chairman is presiding, for the clerk to be asked to accompany the justices when they retire in order to assist them with the evidence.

When these proceedings were served upon the justices, the chairman filed an affidavit in which he said this:

"When we retired to consider our verdict, I requested the clerk to retire with us for two reasons:—(a) that we might have his advice to hand to assist us in ensuring that we applied the correct tests to the evidence, and (b) that we might have the benefit of the notes of the evidence which he had taken and which were more detailed than mine or those of my colleagues. During our retirement we consulted our clerk and we were advised by him on the standard of proof and the tests to be applied for an offence of this nature. We also extensively consulted the notes of our clerk to supplement our own notes and our memories."

The problem of the extent to which it is proper for justices to ask their clerk to retire with them in order to advise them was considered in a number of cases in 1953 and led to the issuing of a Practice Direction by the then Chief Justice, Lord Goddard. It was reported in [1953] 2 All E.R. 1306. I had thought that the substance of this Practice Direction would have been known to every justice, but, if it is not, then it certainly should be regarded as required reading. I do not propose to read it in full but would draw attention for the purposes of this case to two passages. The burden of the Practice Direction is that justices are entitled to be advised by their clerk on questions of law but are not entitled to be advised on questions of fact; further that it is of paramount importance, if justice is not only to be done but to be seen to be done, that the justices' clerk shall not be with the justices in circumstances which might lead the unbiased and disinterested observer to think that they are receiving assistance from him in the performance of their duty to decide all questions of fact. The Practice Direction deals with the question of a clerk's notes at p.1307 where it says:

"In no circumstances, however, may justices consult their clerk as to the guilt or innocence of the accused so far as it is simply a question of fact, but, if a question arises as to the construction of a statute or regulation, they may consult him on whether the facts found by them constitute an offence, because that would be a question of mixed law and fact. They may also properly ask the clerk to refresh their memory as to any matter of evidence which has been given. They can take with them, or send for, any note the clerk may have taken, and if there is anything in the note which needs eluci-

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dation, or if they think something has been omitted or wrongly taken down, it would be perfectly proper for them to consult him."

It is to be noted that the approach in the Practice Direction is that, if the justices need it, they shall resort to the written record prepared by the clerk, not that they shall ask the clerk himself to come to their retiring room. They are only to ask the clerk to retire with them or come to the retiring room if there is something in his notes which requires elucidation. The reason is clear. It is the reason to which I have adverted, namely, that there must be nothing which might lead an observer to conclude that the clerk was taking part in decisions on fact.

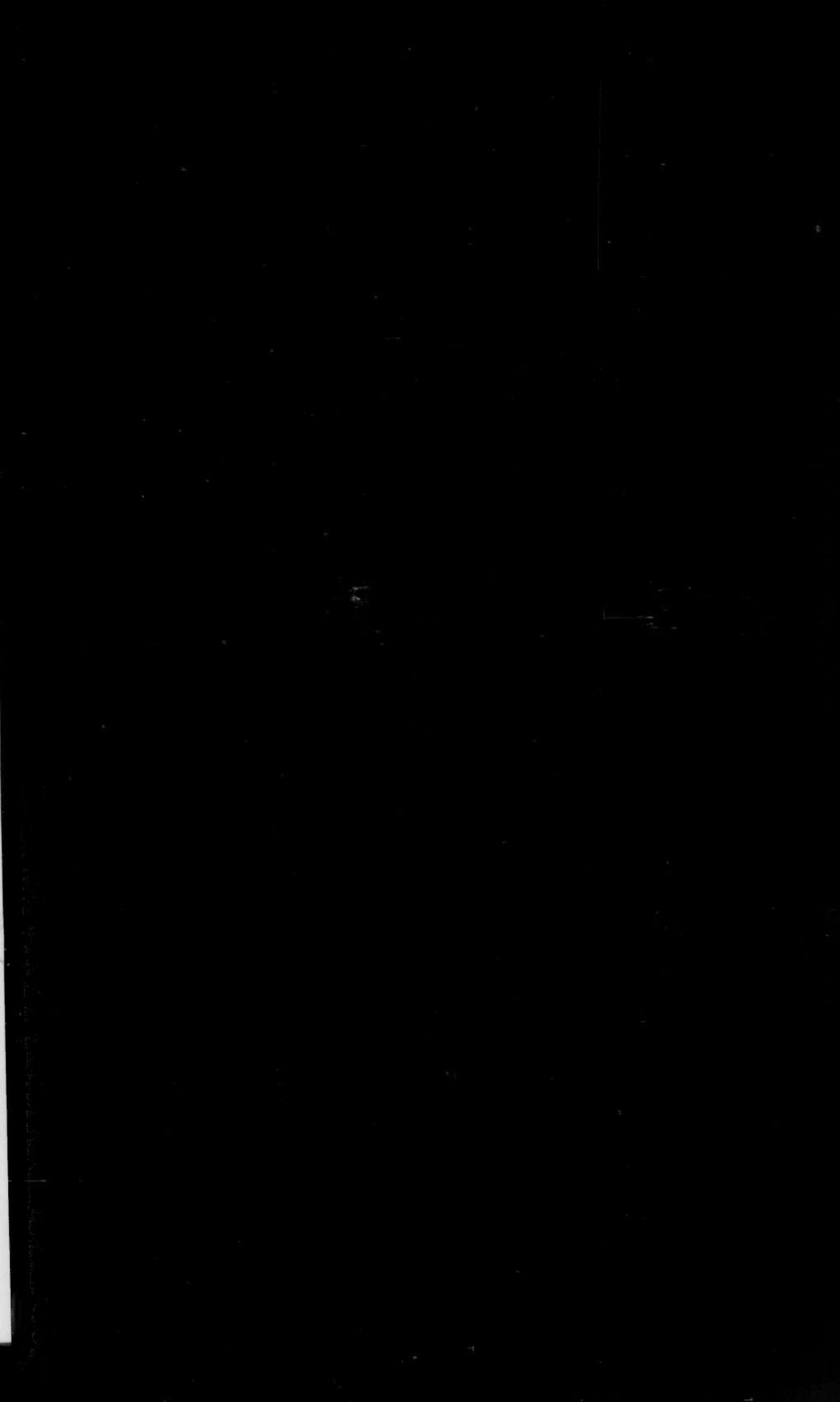
In this case the magistrates, in my judgment, very clearly erred in asking the clerk to retire with them. I am a little surprised that their experience is that the clerk on many occasions has notes of evidence which has entirely escaped the justices. It is one of the most important features of any judge's duties, and for this purpose justices are judges, that he has to learn to take a note of the relevant evidence. I do not pretend that it is an easy job. The professional judge acquires a facility in note-taking over many years in practice at the Bar and on the Bench, but there is nothing esoteric about it. There is nothing which requires professional training to enable you to do it; it is merely a question of practice, and it is highly desirable that justices should learn to take such notes.

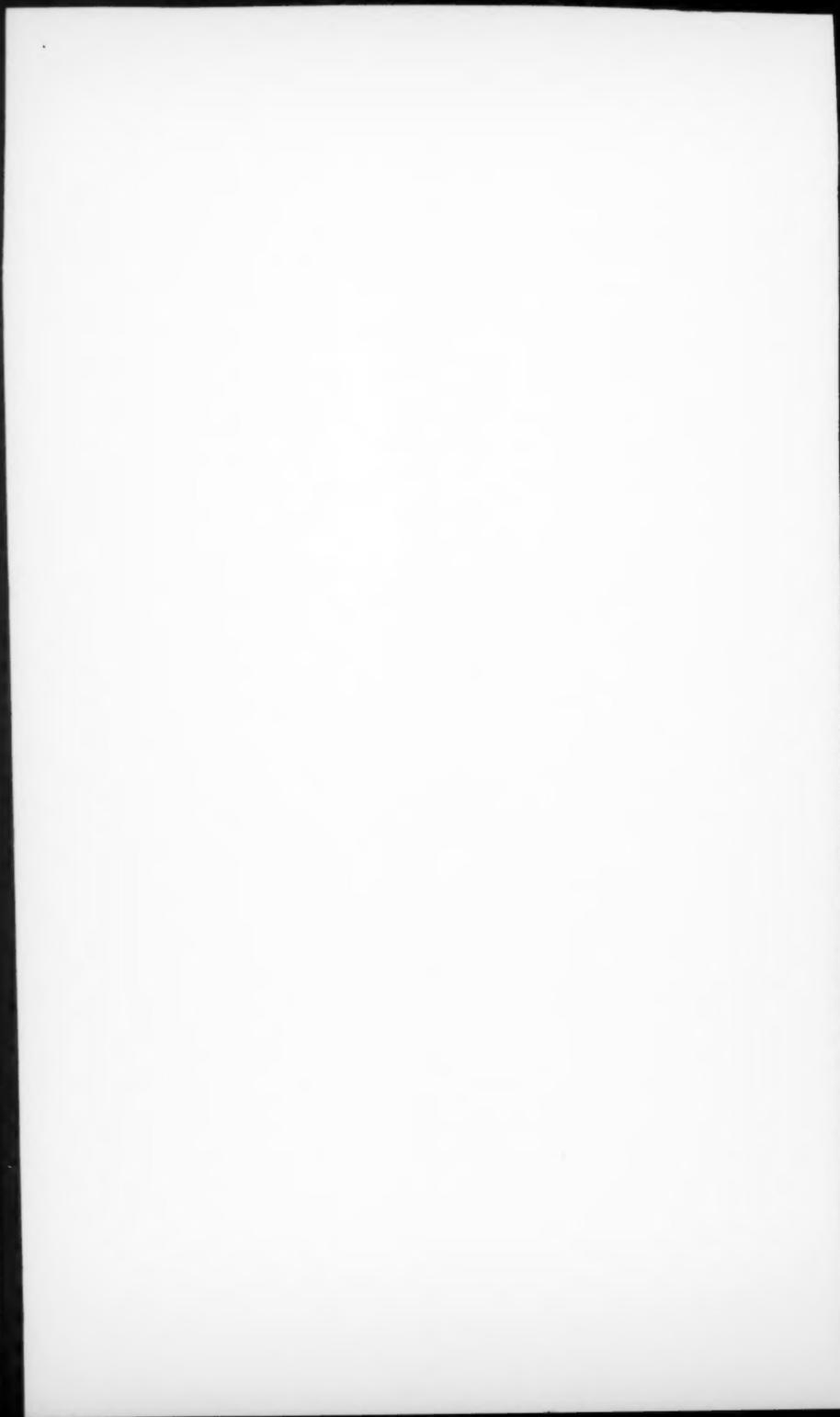
That brings me to the second point which troubles me a great deal in the chairman's affidavit, namely, the suggestion that they consulted their clerk on the standard of proof and the test to be applied in an offence of this nature. In that context I think there is another passage in the Practice Direction which is relevant. The Direction says:

"A clerk should not retire with his justices as a matter of course, nor should they attempt to get round the decision to which I have referred merely by asking him in every case to retire with them, or by pretending that they require his advice on a point of law."

It would be wrong and unfair for me to suggest that the chairman and justices in this case were in any way pretending that they required advice on law when they say that they asked for advice on the standard of proof and the test to be applied when considering a case of driving without due care and attention. But if that is to be accepted at its face value, then I am driven to the inescapable conclusion that neither the chairman nor the justices were capable of fulfilling the duties of their office because knowing the standard of proof which applies in all criminal cases, with certain immaterial exceptions, is wholly fundamental to the discharge of the justices' duty, and there is nothing in the offence of driving without due care and attention which gives rise to any special test as any justice of any experience would know.

I am, therefore, forced to conclude that either these justices were incapable of achieving the standard which we rightly expect of justices or this explanation is a pretence in the sense in which the word is used in the Practice Direction. On either basis this decision should be quashed.





FORBES, J.: I agree. I would only seek to emphasize that, in my view, the most important matter about trials by magistrates is that it should be seen that questions of fact are the decision of the magistrates alone and not decisions of the magistrates and their clerk. That is the fundamental point, and I agree with my Lord that on both points he has mentioned the justices in this case failed to see that that procedure was followed.

DONALDSON, L.J.: We simply quash the decision.

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Order accordingly

Solicitors: *George E. Baker & Co.*, Guildford. The respondents did not appear.

Reported by G.F.L. Bridgman, Esq., Barrister.

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QUEEN'S BENCH DIVISION
(Lord Lane, C.J., and Webster, J.)
November 18, 1980

R. v. TIVERTON JUSTICES. EX PARTE SMITH

Magistrates — Evidence — Use of gauge in private room to test tread on motor vehicle tyres — Magistrates acting as their own expert evidence — Need to hear case in open court.

The applicant was charged with having used a motor vehicle with three defective tyres. At the hearing before the justices the tyres were produced, and when the evidence had been concluded the magistrates asked to be provided by the police with a tyre gauge to enable them to test the tread on the tyres. The applicant objected, but his objection was overruled, a tyre gauge was obtained from the police station, and without any evidence being given as to how the gauge should be used or any other evidence, it was taken by the clerk into the magistrates' room. After some time the magistrates returned to court and found the applicant to be guilty. On an application by him to the Divisional Court for an order of certiorari to quash the decision of the magistrates,

Held: it was not proper for the magistrates to act as their own expert evidence by using in their private room an instrument which had a certain degree of sophistication without any evidence of how the instrument should be used and no opportunity for the defendant or his solicitor to question the way in which it had been used; there had been a plain breach of the magistrates' duty to hear the whole case in open court and in the presence of the defendant and the order for judicial review in the shape of certiorari should go.

Application for judicial review of an order by Tiverton justices.

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J. Marks for the applicant, Neil Victor Smith.
R.J. Robinson for the respondents.

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LORD LANE, C.J.: This is an application for judicial review in the shape of an order of certiorari directed to the Tiverton justices pursuant to leave granted by this court on October 16, 1980.

The applicant was charged with having, on October 4, 1979, used a vehicle, which was described as a motor caravanette, with the rear offside tyre, the rear nearside tyre, and the front offside tyre not having a depth of at least one millimetre throughout at least three-quarters of the breadth of the tread and round the entire outer circumference of the tyre, contrary to reg. 107(1)(f) of the Motor Vehicles (Construction and Use) Regulations, 1978, and s.40(5) of the Road Traffic Act, 1972. The summonses were heard on February 29, 1980, by the justices. The prosecution evidence was confined to one witness, Police Constable Rouse. He told the magistrates on oath that he had seen this vehicle parked and unattended at about 11.15 at night. He said that each of the tyres was five inches wide. Of the three in question one was completely devoid of tread pattern throughout the whole of its circumference, the other two were devoid of tread pattern to the extent respectively of three inches and four inches round the whole of their circumference. The police constable said that he had interviewed the applicant at a later stage and pointed out the offences to him. At the hearing the applicant produced three tyres. Each of them had a tread pattern which was clearly visible for at least three-quarters of the breadth of the tyre and around the whole of the circumference. Police Constable Rouse admitted that those tyres produced in court were the ones that he examined on the evening of October 4. He admitted that there was a tread on each. He conceded very properly, that his examination at the time when he saw the vehicle on October 4 had been conducted by torch light and that he had not carried out any measurement of the depth of the tread of the tyre. There was no further evidence. The defence called no evidence.

Then there occurred the following incident. There is a dispute about many of the details of it, but in essence what happened was this. The justices determined that they wished to test the depth of the tread on these tyres. They, therefore, asked the police to fetch a tyre tread measuring gauge. The solicitor for the defendant, now the applicant, objected. The extent of his objections is in dispute. The chairman of the justices, Mrs. Hilda Elizabeth Johnstone, in her affidavit, describes it as follows:

"The applicant's solicitor appeared initially to be opposed to our receiving a tyre gauge to examine the tyres, but he made no formal objection, and we were not, therefore, called upon to give a ruling. When we retired, the applicant's solicitor knew that a tyre gauge was going to be produced."

The solicitor himself, who dictated a note immediately after the hearing, has exhibited that note to his affidavit and the note reads as follows:

"Then Mrs. Johnstone asked if the policeman had a measuring gauge on him, to which the police officer replied he had not, it was

not the sort of thing they carried around. She asked 'Wouldn't it be in everyone's interests to have these tyres measured to establish whether they are defective or not. Can you get a measuring gauge'.

The policeman said he could get one from Cullompton. I jumped up and said I objected to that. I said: "The justices have to decide the case on the evidence the police bring before you; you have heard the evidence and it is not open to the court to improve on that evidence". Then we had a major discussion about it and I objected strongly, but what it boiled down to was that the police were allowed to go and get their wretched tyre gauge. I said I objected to it being done in open court. I didn't mind the magistrates taking the tyre away with them to their retiring room because we had produced them and it was fair game, they were entitled to look at them . . .".

Where the truth lies between those two versions is perhaps not of vital importance. But it is worth mentioning that whereas that passage which I have just read was from a contemporaneous note, the affidavit of Mrs. Johnstone was sworn on November 4, 1980, which is a considerable number of months since the hearing. So it would not be surprising if the magistrate's memory had perhaps played her false on this point.

What happened thereafter is again subject to a certain amount of dispute. The applicant himself in his affidavit describes the events as follows:

"Upon the conclusion of the evidence of P.C. Rouse the police called no further evidence and the defence did not call any evidence. Thereafter, the justices, of their own volition and without the invitation of the prosecution, asked to be provided with a police tyre gauge. The defence objected to this course; the objections of the defence were overruled. The justices retired, taking with them the tyres, a tyre gauge was obtained by the police from Cullompton Police Station, some six miles distant, and without any evidence being given as to the way in which the same should be used or any other evidence, it was taken by the clerk into the magistrates' retiring room. After a lengthy deliberation the magistrates returned to court, found me guilty, and observed:

"The Bench are drivers and not experts, but we feel there was reason to believe the tyres were coming to the end of their usable (sic) lives".

That version of events was not challenged, in so far as the final remark is concerned, by Mrs. Johnstone in her affidavit, nor is there a challenge by the solicitor who conducted the prosecution. It is however now challenged by the gentleman who was acting as deputy clerk to the justices on the occasion in question, Mr. Eveleigh, in an affidavit which was sworn as recently as yesterday, November 16. What he says is:

"I am quite sure that neither the chairman nor either of her colleagues upon returning to court observed 'the Bench are drivers

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and not experts, but we feel there was reason to believe the tyres were coming to the end of their usable lives'."

By consent of both the parties we had our attention drawn to a report in the Tiverton Gazette of March 4, 1980, which would be four days after the hearing by the magistrates, in which the following heading appeared: "S.O.S. for a gauge", followed by a column of report. In the last paragraph of the report it is said:

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"The magistrates' chairman, Mrs. Elizabeth Johnstone, said members of the Bench were all drivers and not experts and they felt there was reason to believe the tyres were coming to the end of their usable lives."

It seems to us, on that evidence, that that form of words was used by Mrs. Johnstone.

ii

The way in which the matter is put on behalf of the applicant is that the use of the tyre gauge was completely wrong in the circumstances, that it was equivalent to the magistrates receiving fresh evidence after they had retired and in the absence of the defendant. Such evidence was not the subject of cross-examination and could not be. That is the first objection put forward.

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In my view this is an objection which has foundation. It is not proper for magistrates to act as their own expert evidence in their private room by using the instrument which had a certain degree of sophistication about it. There was no evidence as to their knowledge of how the instrument should be used. There was no opportunity for the defendant or his solicitor to question the way in which it had been used. In my judgment this was a plain breach of the justices' duty to hear the whole case in open court and in the presence of the defendant, and the way in which the case was conducted was objectionable. On that ground alone this order, in my judgment, should go.

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There is a further ground, and it is this. On the basis that I feel sure that the chairman of the justices did use the words which I have quoted it is plain that the justices did not direct their mind to the question which they had to decide, and that was whether the tread on these tyres over the requisite area was of the requisite depth which in the regulation is described as one millimetre. "There was reason to believe the tyres were coming to the end of their usable (or useful — whichever expression was used) lives" is a misapprehension of the burden of proof and a misapprehension of what it was they had to consider. In all the circumstances this is a case, in my judgment, where certiorari should go and the conviction should be quashed.

Webster, J.

WEBSTER, J.: I agree.

Solicitors: *Bower Cotton & Bower* for *Ashford Sparkes & Harward*,
Tiverton; *G.D. Cann & Hallett*, *Exeter*.

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Reported by G.F.L. Bridgman, Esq., Barrister.

QUEEN'S BENCH DIVISION
(Donaldson, L.J., and Bingham, J.)
February 10, 1981

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ANDERTON v. RODGERS AND OTHERS

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Licensing — Offence — Sale of intoxicating liquor without licence — Sale to non-members of club — Sale by barman servant of committee — Liability of members of committee — Licensing Act, 1964, s.160(1).

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Members of the committee of a club were charged with an offence under s.160(1) of the Licensing Act, 1964 (selling liquor without licence), in that the barman at the club had sold liquor to visitors who were not members of the club, but justices acquitted them on the ground that there was no connivance, aiding or abetting or being accessory to the illegal sales by the members of the committee. On an appeal by the prosecutor,

Held (allowing the appeal): this was an absolute offence, and once it was accepted that the barman was a servant of the committee the members of the committee were *ipso facto* guilty of the offence: the fact that under the rules of the club sales to non-members were not permitted afforded no defence to the committee.

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Per Curiam: There was no finding in the case that specific instructions were given to the bar staff not to serve non-members, but the existence of such instructions, provided that the servant was acting within the scope of his employment, would not provide the members of the committee with any defence.

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Case Stated by justices for Greater Manchester sitting at Eccles.
N.H. Simmonds for the appellant.
The respondents did not appear.

Donaldson, L.J.

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DONALDSON, L.J.: This is a police prosecutor's appeal by Case Stated from the decision of justices for the county of Greater Manchester sitting at Eccles who acquitted the members of the committee of the Talbot Catholic Club of an offence contrary to s.160 of the Licensing Act, 1964. Section 160 provides:

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"(1) Subject to the provisions of this Act, if any person — (a) sells or exposes for sale by retail any intoxicating liquor without holding a justices' licence or canteen licence authorising him to hold an excise licence for the sale of that liquor, or (b) holding a justices' licence or a canteen licence sells or exposes for sale by retail any intoxicating liquor except at the place for which that licence authorises . . . the sale of that liquor, he shall be guilty of an offence under this section."

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The members of the committee were, with one exception, all on the club premises when it is alleged that the offence was committed, but they are not prosecuted in this case because they personally participated in the sale. They are prosecuted because the barman sold liquor to visitors who were not members and were not entitled to receive liquor under the terms of the rules of the club. The justices

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acquitted on the grounds that there was no connivance at or aiding or abetting of or being accessory to the illegal sales by members of the committee. That is fully accepted, but this was an absolute offence, and once it is accepted, as it was, that the barman was a servant of the committee of the club, the members of the committee are ipso facto guilty of the offence. The purpose of the section is set out in *Williamson v. Norris*(1) where Lord Russell of Killowen, C.J., said:

"The sale struck at is a sale by the master or the principal".

That was under an earlier statute, but the wording is in all material respects the same.

The justices were referred to a decision by the Divisional Court in *Phipps v. Hoffman*(2), in which the judgment was given by Tasker Watkins, J., as he then was. That case, which might be thought to support their decision, is distinguishable in an important respect because there the club was an incorporated body whereas the club with which we are concerned is an unincorporated body. In *Phipps v. Hoffman*(2) it was the corporate body which was the employer of the staff and it was the corporate body that sold the liquor. It would follow that the committee of that club were not directly involved in the sale and quite different considerations applied.

There is another case which was mentioned in the books and in *Phipps v. Hoffman*(2), and that is *Newman v. Jones*(3). That case, we are told, has had a long and "distinguished", if that is the right word, career of either being ignored or distinguished. It could be distinguished from the present case on the basis that it was a decision whether trustees of club property are liable in circumstances such as these. But for my part I would rely upon the decision of this court in *Commissioners of Police v. Cartman*(4) where Lord Russell of Killowen, C.J., said this:

"The learned magistrate believed that the respondent bona fide gave instructions to his barman that no drunken person should be served, and that he intended those instructions to be acted upon, but the question is whether that fact affords any answer to the charge. In considering this question, we must see what is the object of the Act, and how far that object would be affected or defeated if the construction contended for by the respondent were given to this section. There can be no question as to the object of this section; it was intended in the interest of public order to prevent the sale of intoxicating liquors to drunken persons. It must be remembered that the persons from whom alone intoxicating liquors can be obtained are licensed persons: how do they carry on their business? From the nature of the case it must be largely carried on by others on their behalf; it is true that sometimes the licensee keeps in his own hands the direct control over his own business, but in the great majority of cases it is not so, the actual direct control being deputed to other persons; are the licensees in these latter cases to

(1) 62 J.P. 790; [1899] 1 Q.B.7

(2) not reported

(3) (1886), 50 J.P. 373; 17 Q.B.D. 132

(4) 60 J.P. 357; [1896] 1 Q.B. 655

be liable under this section for the acts of others? In my opinion they are, subject to this qualification, that the acts of the servant must be within the scope of his employment."

Commissioners of Police v. Cartman(4) was a case under the equivalent of s.172 of the present Act, but the principle mutatis mutandis is applicable to s.160. I mention this matter because it is possible that the justices may have had in mind that under the club rules sales to outsiders were not permitted. To make it quite clear, that in itself would be no defence at all for the committee.

There was no finding in the present case that specific instructions were given to the bar staff not to serve outsiders, but I cite this case because we are told that other cases are pending which may be influenced by our decision in this case in which there were such specific instructions. It is clear to me that the existence of specific instructions, provided always that the servant is acting within the scope of his employment, would provide the club committee with no defence.

It follows that the appeal should be allowed and, in my view, the case remitted to the justices with a direction to convict.

BINGHAM, J.: I agree. The justices clearly approached this case with very great care, adjourning the initial hearing in order that there could be further argument and further references to authority to aid them in making their decision. In the result they were referred to the decision of this court, to which my Lord has already referred, of *Phipps v. Hoffman*(2). It is perhaps worthy of note that in the course of his judgment in that case Tasker Watkins, J., said:

"It has been conceded that the club being a corporate body could also have been proceeded against upon the basis that the barmaids were servants of the club."

If that reasoning is applied to the present case, it is quite clear that a different result would have followed in *Phipps v. Hoffman* on the present facts, where it is admitted that those making the actual sales were the servants of the committee. It is also worthy of note that in the course of his judgment Tasker Watkins, J., refers to *Newman v. Jones*(3), but that is, for the reasons that my Lord has given, an authority to be treated with some caution. It turned upon the crucial finding made by the court in that case that those making the sale were acting in direct contravention of orders which they had been given by the committee of the club. But in the light of *Commissioners of Police v. Cartman*(4) it is clear that that in itself cannot exempt the members from liability. For the reasons that my Lord has given, accordingly, I agree that the case should be returned to the justices with a direction to convict.

Solicitor: D.S. Gandy, Chief Prosecuting Solicitor, Manchester.

Reported by G.F.L. Bridgman, Esq., Barrister.

- (2) not reported
(3) (1886), 50 J.P. 373; 17 Q.B.D. 132
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QUEEN'S BENCH DIVISION
(Donaldson, L.J., and Hodgson, J.)
November 27, 1980

ALBERT v LAVIN

Criminal Law – Assault – Defence – Self-defence – Honest but mistaken belief that action justified – Need for reasonable grounds for belief.

The appellant was in a crowd of people waiting for an omnibus. When the omnibus arrived he pushed past other people which caused resentment among those who had been waiting, and the respondent, who was a police officer off duty and in plain clothes, formed the opinion that a breach of the peace might take place so he tried to stop the appellant by standing in his way. The appellant, however, seized the respondent's coat with his left hand and made to hit him with his right hand. The respondent told him that he was a police officer, but the appellant said that he did not believe him. A struggle ensued, the respondent forced the appellant to the ground and told him that he was being arrested for assaulting a constable in the execution of his duty. When the matter came before the magistrates the appellant contended that he genuinely believed that the man restraining him was not a police officer and that he was entitled to use reasonable force in self-defence. The magistrates convicted the appellant and conditionally discharged him for one year. The appellant appealed.

Held (dismissing the appeal): it was no defence to a charge of assault that the accused honestly believed that circumstances existed which would have justified his action as being undertaken in self-defence unless there were reasonable grounds for that belief.

Per Curiam: An ill-founded but completely honest and genuine belief removed all or much of the culpability involved in the offence. It, therefore, provided powerful mitigation, and in an appropriate case would justify a court granting an absolute discharge.

Case stated by Brentford Justices.

J Walker for the appellant.

L Reide for the respondent.

27th November, 1980. Hodgson, J., read the following judgment: This is an appeal by Case Stated from the decision of lay magistrates for the Middlesex area sitting at Brentford. The information preferred against the appellant charged him with assaulting the respondent, a police officer, in the execution of his duty, on June 8, 1979, at The Mall in Ealing. The magistrates took no less than three days to hear this case lasting from the first hearing on January 12, 1979, to November 6, 1979, on which date they found the appellant guilty.

The facts of the case appear from the careful findings made by the magistrates. In June, 1979, the appellant was working for the BBC in the White City. On the afternoon of June 8, 1979, he left work early as he was ill. His route home was by way of underground to Ealing Broadway and thereafter by a no 207 bus from The Mall to Southall. The respondent, who was a police officer, was also intending to travel from The Mall by a no 207 bus. The bus stop which both had to use had provision for only one queue but was used for other buses as well as the no 207 buses. Consequently when a bus arrived it was

necessary for those who intended to board it to walk along the queue, passing those intending passengers who were awaiting another bus. The respondent was off duty and in plain clothes. He was standing at the front of the queue. The appellant was further down the queue. When a no 207 bus arrived the appellant pushed past other people in the queue. This caused resentment and several people in the queue objected to the appellant's conduct. The respondent tried to obstruct the appellant's entry to the bus by standing in his way. The magistrates were of the opinion that the reactions of the other members of the queue caused the respondent reasonably to expect that a breach of the peace was about to take place and that he was entitled to use reasonable force to prevent that breach. He was, the magistrates found, acting in the course of his duty when he obstructed the appellant's access to the bus.

What happened next can charitably be attributed to the appellant's illness. He pushed past the respondent onto the first step of the bus, grabbed the lapel of the respondent's coat with his left hand and made to hit him with his right hand. In order to protect himself the respondent pulled the appellant from the bus and away from the queue into an adjacent shop doorway. During this time the appellant was highly excited and was trying to hit the respondent who, at that stage, had made no attempt to reveal his identity as a police officer. The appellant then apparently calmed down somewhat but was still struggling. Each had hold of the other's clothing, and the respondent then told the appellant that he was a police officer and would arrest the appellant unless he stopped struggling. The appellant heard the respondent say he was a policeman and asked to see his warrant card, but because each had hold of the other's clothing it was impossible for the respondent to produce it. The appellant did not believe the respondent when he said he was a policeman. He became excited once more and hit the respondent five or six times in the abdomen. These were the blows which were the subject of the information. A struggle ensued and the respondent forced the appellant to the ground, repeated the fact that he was a police officer, and told the appellant that he was being arrested for assaulting a constable in the execution of his duty. The appellant was taken to Ealing police station and charged, whereupon he protested that he had not believed the respondent to be a constable until after he had been arrested.

The magistrates found that the appellant's reaction to the respondent's obstruction of his access to the bus, his excitable behaviour, and his attempts to hit the respondent amounted to a continuing breach of the peace, and that, accordingly, the respondent was entitled to use reasonable force to prevent a continuing breach of the peace by the appellant lasting up to the moment of his arrest. They further found that the respondent had done everything a reasonable man could do in the circumstances to ensure that the appellant knew he was a constable. They accepted that the appellant genuinely believed that the respondent was not a constable but that he had no reasonable grounds for this belief. The appellant had, they found, no reasonable grounds for doubting that the respondent was a constable. Finally the magistrates found that, if the appellant was being unlawfully detained by the respondent, the blows which were the subject of the information

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amounted to the use of no more force than was reasonable to effect his release from an unlawful detention.

On those findings of fact counsel, who has argued the appellant's case with skill and economy, submits that the conviction was wrong for two reasons. First, he contends that the respondent unlawfully detained the appellant and that the appellant was entitled to use reasonable force to effect his release. This argument is based on the well-established principle that to detain a man against his will without arresting him is an unlawful act and a serious interference with a citizen's liberty. It is said that the restraint placed on the appellant by the respondent amounted to a detention without arrest and was therefore unlawful, and that the appellant was justified in his use of reasonable force. On the facts the respondent was clearly not intending to arrest the appellant when he was holding him in the shop doorway.

It is however clear law that a police officer, reasonably believing that a breach of the peace is about to take place, is entitled to take such steps as are necessary to prevent it, including the reasonable use of force: see *King v Hodges* (1) and *Piddington v Bates* (2), and, if those steps include physical restraint of someone, then that restraint is not an unlawful detention but a reasonable use of force. It is a question of fact and degree when a restraint has continued for so long that there must be either a release or an arrest, but on the facts found in this case it seems to me to be clear that that point had not been reached. Obviously where a constable is restraining someone to prevent a breach of the peace he must release (or arrest) him as soon as the restrained person no longer presents a danger to the peace. In this case the magistrates found that the appellant continued in breach of the peace up to the time when he assaulted the respondent.

The second argument presented to us by counsel is a much more difficult one. It is this. On the findings of fact made by the magistrates the appellant genuinely believed that the man restraining him was not a police constable, that if he had not been a police constable what he was doing to the appellant was a false imprisonment and assault, that the appellant would in the circumstances he believed to exist have been entitled to use reasonable force in self-defence, and that the magistrates found as a matter of fact that what he did would in those supposed circumstances have been reasonable.

The question which we are being asked to answer based on counsel's submission is this: Whether a person being detained in the circumstances set out above but who does not accept that the person detaining him is a police constable may be convicted of an assault on a constable in the execution of his duty if he uses no more force than is reasonably necessary to protect himself for what he mistakenly and without reasonable grounds believes to be an unjustified assault and false imprisonment. The short question is whether in the circumstances set out a person's belief (the added words 'honest' or 'genuine' may be useful emphasis but in fact add nothing) is of itself sufficient to render him not guilty or whether that belief must be reasonable belief or, which is the same thing, a belief based on reasonable grounds.

(1) [1974] Crim L.R. 424

(2) [1960] 3 All E.R. 660; [1961] 1 W.L.R. 162

But, before I come to deal with this difficult question for which, surprisingly, no direct authority cited to or known to me provides an answer, I must make two things clear. First, it is not contended that it is necessary that the appellant should have known that the man he was hitting was a police officer before he could be guilty of assaulting a police officer in the execution of his duty. On the wording of s.51 of the Police Act, 1964, it is now trite law that that is not so. What is in issue here is whether the appellant is guilty of an assault at all.

I turn now to deal with the most important question in this appeal. As I have said, there appears to be no reported instance of a man being convicted of an assault (or aggravated assault) when he acted, as he believed, in self-defence, but the belief was held to be unreasonable. However nearly all the authorities when considering self-defence require that a mistaken belief must be reasonable.

In *R v Weston* (3) Cockburn, C.J., in directing the jury on the law relating to self-defence, said:

'if under such circumstances, the prisoner resorted to the gun in order to defend himself from serious violence, or under a reasonable apprehension of it, and so used it in necessary self-defence he would be justified.'

In *R v Rose* (4) Lopes J told the jury that they were entitled to acquit on the ground of self-defence only:

'if you think that at the time he [the defendant] fired that shot he honestly believed, and had reasonable grounds for the belief, that his mother's life was in imminent peril . . .'

In 10 Halsbury's Laws (3rd edn) 721, para 1382, the rule (in relation to murder) was formulated thus:

'Where a forcible and violent felony is attempted upon the person of another, the party assaulted . . . is entitled to repel force by force, and, if necessary, to kill the aggressor. There must be reasonable necessity for the killing, or at least an honest belief based upon reasonable grounds that there is such necessity . . .'

In *R v Chisam* (5) this statement of the law was expressly approved. That case held that, where a man is charged with the killing of another and alleges that the killing took place in defence of a relative or friend, in order that that defence may be available, he must have believed that that relative or friend was in imminent danger and the belief must have been based on reasonable grounds. Reasonable grounds of such belief may, however, exist though they are founded on a genuine mistake of fact. In giving the judgment of the court Lord Parker, C.J.,

(3) (1870), 14 Cox CC 346

(4) (1884), 15 Cox CC 540

(5) (1963) 47 Cr. App. R. 130

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cited with approval a passage from the direction of the Lord Justice-General (Lord Normand) in *Owens v HM Advocate* (6):

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'In our opinion self-defence is made out when it is established to the satisfaction of the jury that the panel believed that he was in imminent danger and that he held that belief on reasonable grounds. Grounds for such belief may exist though they are founded on a genuine mistake of fact.'

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The requirement of reasonableness is also to be found in *R v Fennell* (7).

So far as self-defence is concerned the only dictum which recognises what may be called the subjective view which I have been able to find is *R v Porritt* (8). That was a case of capital murder and the point at issue was whether, where there was evidence of facts which could amount to provocation but that partial defence had not been raised, the issue should have been left to the jury. In giving the judgment of the Court of Criminal Appeal, Ashworth, J., said:

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'At the trial it was conceded on behalf of the Crown that if the jury took the view that the firing was done in the honest belief that it was necessary for the protection of his stepfather, then the proper verdict was one of not guilty, and a similar concession was made in regard to the possibility of an honest belief that it was reasonably necessary to protect the house by shooting.'

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It may be that the facts were thought to be so strong by the prosecution (the defendant was found guilty of capital murder by the jury) that they felt able to go further than they needed to in regard to self-defence. All that can be said is that Ashworth, J., did not say that the concessions had gone further than was necessary.

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The rule that only a reasonable mistake may constitute a ground for the defence of self-defence has (both before and since *Director of Public Prosecutions v Morgan* (9) been vigorously criticised (see Glanville Williams, *Criminal Law – The General Part* (2nd edn, 1961, para 73, pp 208 – 209); Kenny, *Outlines of Criminal Law* (19th edn, 1966, pp 59 – 60); Russell on *Crime* (12th edn, pp 75 – 76); Smith and Hogan, *Criminal Law* (4th edn, pp 328 – 329, 364 – 365)). While *Morgan* was on its way from the Court of Appeal to the House of Lords, Professor Smith wrote a comment on the Court of Appeal decision in which he strongly contended for the subjective test (see [1975] *Crim LR* 40). Perhaps the most cogent recent criticism of the objective test is to be found in Professor Glanville Williams's *Textbook of Criminal Law* (pp 451). He concludes a lengthy and extremely persuasive argument with the words: 'The law must be prepared, so far as it can do so, to look into the mind of the defendant and give him the benefit of the facts as they appeared to him.'

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(6) 1946, JC 119

vi (7) 135 JP 678; [1970] 3 All E.R. 215; [1971] 1 Q.B. 428

(8) 125 JP 605; [1961] 3 All E.R. 463; [1961] 1 WLR 1373

(9) 139 JP 476; [1976] AC 182

Counsel for the appellant has asked us to look again at the requirement of reasonableness in the light of the decision of the House of Lords in *Morgan*. Professor Glanville Williams warns that that decision is a formidable obstacle to any argument in favour of the subjective rule. He goes on to say, correctly:

'but here again it may be said that the question of mens rea in relation to defences was not before the House, it being held that the question of consent in rape was not a matter of defence but an ingredient of the offence.'

To find out what *Morgan* says directly about self-defence and mistaken belief, it is convenient to begin with the judgment of Bridge, J., in the Court of Appeal where he said (10):

'The relevant principles can perhaps be restated in the following propositions: (i) In all crimes the Crown has both the evidential and the probative burden of showing that the accused did the prohibited act, and where that act, according to the definition of the offence, is an act of volition, of showing that the act of the accused was voluntary. An obvious example of a crime where the evidential burden on the Crown is limited to these elements is common assault. (ii) Wherever the definition of a crime includes as one of its express ingredients a specific mental element both the evidential and the probative burden lie on the Crown with respect to that element. Typical examples are dishonesty in theft and knowledge or belief in handling. In seeking to rebut the Crown's case against him in reference to his state of mind the accused may and frequently does assert his mistaken belief in non-existent facts. Of course it is right that in this context the question whether there were reasonable grounds for the belief is only a factor for the jury's consideration in deciding whether the Crown has established the necessary mental element of the crime. This is because the issue is already before the jury and no evidential burden rests on the accused. The decision of the Divisional Court in *Wilson v Inyang* (11) is to be understood in the light of this principle. The court there rejected the argument that an acquittal by a magistrate of a defendant charged with an offence under s.40 of the Medical Act, 1858, should be reversed on appeal by Case Stated on the ground that the defendant had no reasonable ground for his belief that he was entitled to call himself a "physician". Lord Goddard, C.J., said: "if he has acted without any reasonable ground and says: 'I had not properly inquired, and did not think this or that,' that may be (and generally is) very good evidence that he is not acting honestly. But it is only evidence." The Act, however, under which that prosecution was brought required the prosecution to prove that the defendant acted "wilfully and falsely". Inevitably, therefore, if this subjective mental element was not

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(10) [1976] AC 190, 191

(11) 115 JP 411; [1951] 2 KB 799

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proved the prosecution failed. (iii) Where, however, the definition of the crime includes no specific mental element beyond the intention to do the prohibited act, the accused may show that though he did the prohibited act intentionally he lacked mens rea because he mistakenly, but honestly and reasonably, believed facts which, if true, would have made his act innocent. Here the evidential burden lies on the accused but once evidence sufficient to raise the issue is before the jury the probative burden lies on the Crown to negative the mistaken belief. The rationale of requiring reasonable grounds for the mistaken belief must lie in the law's consideration that a bald assertion of belief for which the accused can indicate no reasonable ground is evidence of insufficient substance to raise any issue requiring the jury's consideration. Thus, for example, a person charged with assault on a victim shown to have been entirely passive throughout who said he had believed himself to be under imminent threat of attack by the victim but could indicate no circumstance giving cause for such a belief would not discharge the evidential burden of showing a mistaken belief that he was acting lawfully in self-defence.'

In the House of Lords, Lord Hailsham cited the whole of this passage and continued:

'In the event Bridge, J., then went on to subsume rape under the third and not the second heading and so to reach the conclusion: "The correct view, we think, is that, on proof of the fact of absence of consent from circumstances which in the nature of the case must have come to the notice of the defendant he may be presumed to have appreciated their significance, and it is this presumption which casts on the defendant the evidential burden of showing an honest and reasonable belief in consent before any issue as to his state of mind can arise for the jury's consideration." He goes on to say that, once the "evidential" burden is discharged the "probative burden" is cast once more on the Crown. With due respect, though with one qualification, there is something to be said for the premise of this statement. I do not believe the conclusion follows. The qualification I make to the premise is that I can see no reason why the class of case to which his second proposition applies should be limited to cases where the mental ingredient is limited to a "specific mental element" if, as appears to be the case, by that is meant an "ulterior" within Smith and Hogan's definition of that term (Criminal Law, 3rd edn, 1973, p 47). I believe the law on this point to have been correctly stated by Lord Goddard in *R v Steane* (12) when he said: ". if, on the totality of the evidence, there is room for more than one view as to the intent of the prisoner, the jury should be directed that it is for the prosecution to prove the intent to the jury's satisfaction, and if, on review of

the whole evidence, they either think the intent did not exist or they are left in doubt as to the intent, the prisoner is entitled to be acquitted." That was indeed, a case which involved a count where a specific, or, as Smith and Hogan call it, an ulterior, intent was, and required to be, charged in the indictment. But, once it be accepted that an intent of whatever description is an ingredient essential to the guilt of the accused I cannot myself see that any other direction can be logically acceptable. Otherwise a jury would in effect be told to find an intent where none existed or where none was proved to have existed. I cannot reconcile it with my conscience to sanction as part of the English law what I regard as logical impossibility, and, if there were any authority which, if accepted would compel me to do so, I would feel constrained to declare that it was not to be followed. However, for reasons which I will give, I do not see any need in the instant case for such desperate remedies. The beginning of wisdom in all the "mens rea" cases to which our attention was called is, as was pointed out by Stephen J in *R v Tolson* (13), that "mens rea" means a number of quite different things in relation to different crimes. Sometimes it means an intention, eg in murder, "to kill or to inflict really serious injury". Sometimes it means a state of mind or knowledge, eg in receiving or handling goods "knowing them to be stolen". Sometimes it means both an intention and a state of mind, eg "dishonestly and without a claim of right made in good faith with intent permanently to deprive the owner thereof". Sometimes it forms part of the essential ingredients of the crime without proof of which the prosecution, as it were, withers on the bough. Sometimes it is a matter, of which, though the "probative" burden may be on the Crown, normally the "evidential" burden may usually (though not always) rest on the defence, eg "self-defence" and "provocation" in murder, though it must be noted that if there is material making the issue a live one, the matter must be left to the jury even if the defence do not raise it. In statutory offences the range is even wider since, owing to the difficulty of proving a negative, Parliament quite often expressly puts the burden on the defendant to negative a guilty state (see per Lord Reid in *Sweet v Parsley* (14), or inserts words like "fraudulently", "negligently", "knowingly", "wilfully", "maliciously", which import special types of guilty mind, or even imports them by implication by importing such a word as "permit" (cf Lord Diplock in the same case (15)) or as in *Warner v Metropolitan Police Commissioner* (16) prohibit the "possession" of a particular substance, or, as in *Sweet v Parsley* itself (14), leaves the courts to decide whether a particular prohibition makes a new "absolute" offence or provides an escape by means of an honest, or an honest and reasonable belief. Moreover of course, a statute can, and often does, create

(13) (1889) 54 JP 420; 23 QBD 168

(14) 133 JP 188; [1970] AC 132

(15) [1970] AC 132

(16) 132 JP 628; [1963] 2 AC 256

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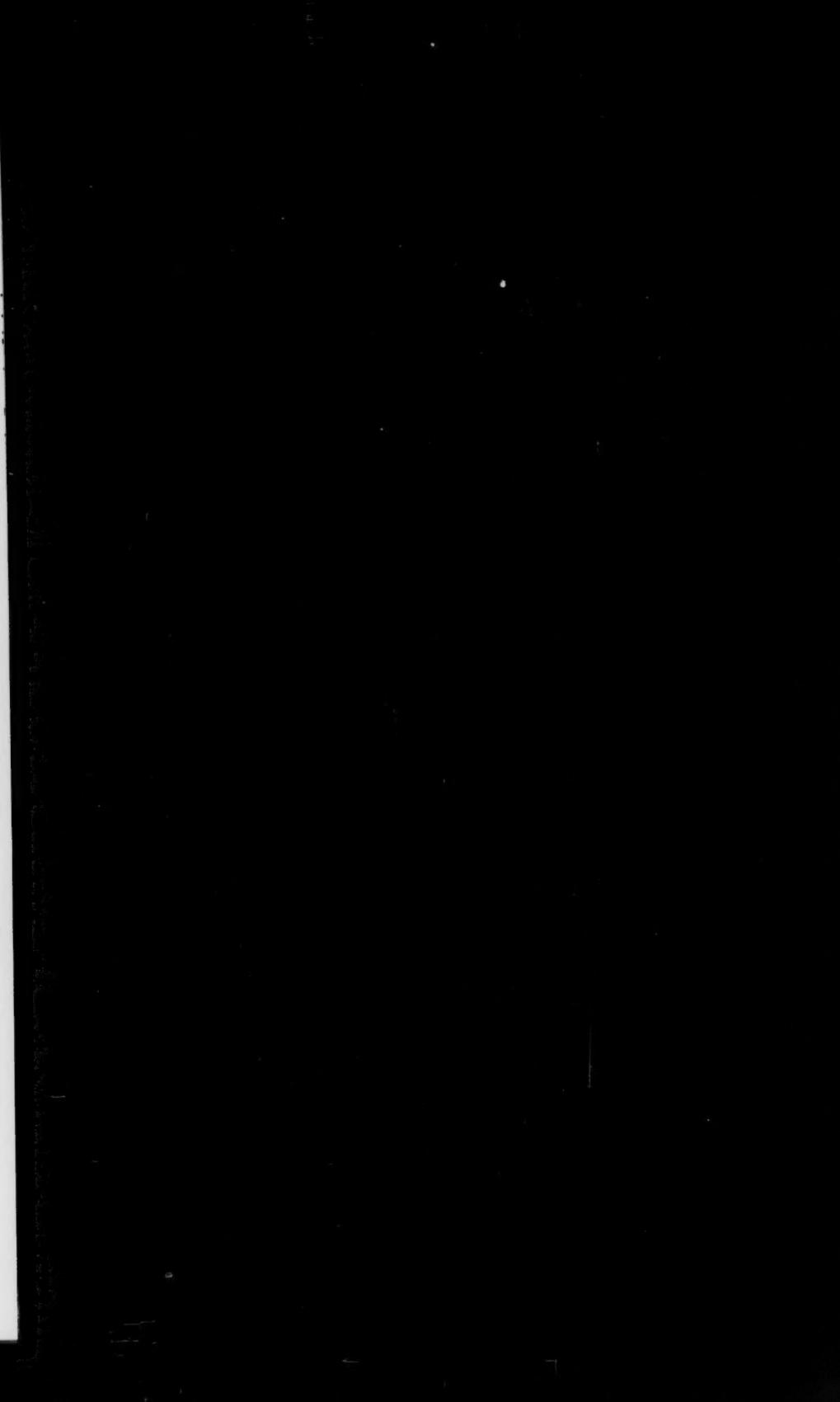
an absolute offence without any degree of mens rea at all. It follows from this, surely, that it is logically impermissible, as the respondent sought to do in this case, to draw a necessary inference from decisions in relation to offences where mens rea means one thing, and cases where it means another, and in particular from decisions on the construction of statutes, whether these be related to bigamy, abduction or the possession of drugs, and decisions in relation to common law offences. It is equally impermissible to draw direct or necessary inferences from decisions where the mens rea is, or includes, a state of opinion, and cases where it is limited to intention (a distinction I referred to in *Hyam v Director of Public Prosecutions* (17), or between cases where there is a special "defence", like self defence or provocation, and cases where the issue relates to the primary intention which the prosecution has to prove. Once one has accepted, what seems to me abundantly clear, that the prohibited act in rape is non-consensual sexual intercourse, and that the guilty state of mind is an intention to commit it, it seems to me to follow as a matter of inexorable logic that there is no room either for a "defence" of honest belief or mistake, or of a defence of honest and reasonable belief and mistake. Either the prosecution proves that the accused had the requisite intent, or it does not. In the former case it succeeds, and in the latter it fails. Since honest belief clearly negatives intent, the reasonableness or otherwise of that belief can only be evidence for or against the view that the belief and therefore the intent was actually held, and it matters not whether, to quote Bridge, J., in the passage cited above: "the definition of a crime includes no specific element beyond the prohibited act." If the mental element be primarily an intention and not a state of belief it comes within his second proposition and not his third. Any other view, as for insertion of the word "reasonable", can only have the effect of saying that a man intends something which he does not.'

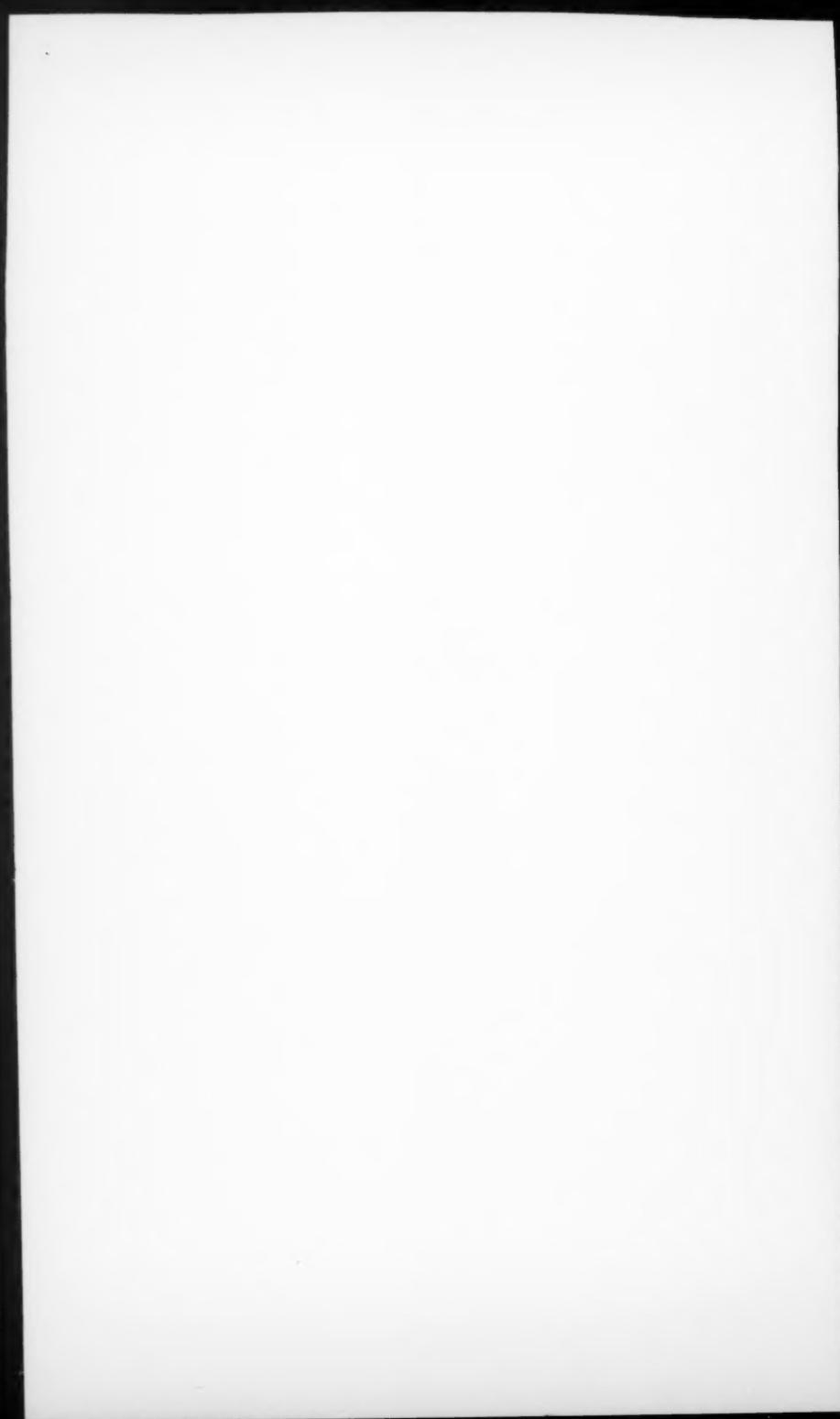
It is clear from the passage I have cited that Lord Hailsham was accepting as good law the requirement of reasonableness in self-defence. Neither of the other two majority speeches referred to self-defence specifically but both the dissenting speeches did. Lord Edmund-Davies said:

'The law requires that reasonable grounds for believing that physical action in self-defence or defence of another is called for'

and he cited four of the cases to which I have referred. Lord Simon said:

'Lord Edmund-Davies has cited the cases which exemplify the same rule operating in the common law doctrine of self-defence. Once the prosecution has discharged the burden of





proving an *actus reus* of assault and (by inference therefrom or extrinsically) the necessary *mens rea*, the evidential burden shifts to the accused. He can discharge it by raising a case fit for the consideration of the jury that he believed in a state of affairs whereby the *actus* proved by the prosecution would not be *reus*. He may do this by showing that his conduct towards the victim was prompted by his belief that the victim was about to attack him, and that what he did was no more than was necessary for his own defence in the circumstances as he believed them to exist. But it is clear law that, in order to establish a defence in such circumstances, his belief must be based on reasonable grounds.'

It is clear from these citations that the majority of the House of Lords, albeit obiter, approved of the objective test in self-defence.

The reason why the House of Lords was able to reach the decision which it did in *Morgan* (9) without overruling the authorities on self-defence was because they distinguished between the *mens rea* required for the basic or definitional elements of an offence and that required for defence. It is said that the offence of assault requires an attack on a person (definitional element) but that the question whether the attack had to be made by the defendant in self-defence is a defence element, and the question of fault is not the same. It is this double test of defendant's state of mind which has been the subject of vigorous academic criticism.

But counsel for the appellant submits that, despite the long line of authority some of which I have cited and the obiter dicta in *Morgan* (9), the ratio decidendi itself of *Morgan* leads one, in respect of self-defence, to a different conclusion as to what the law is. The argument goes thus. He accepts that to decide, in respect of any offence, whether the objective or subjective test should be applied to mistake it is necessary first of all to see what the definitional elements of the offence are. Citing Archbold: *Pleading, Evidence and Practice in Criminal Cases* (40th edn, para 2634) he submits that the definition of assault is the actual or intended use of unlawful force to another without that other's consent, and that, just as lack of consent is one of essential ingredients, so the unlawfulness of the assault is another. Applying the reasoning in *Morgan* (9), he says that the intention which the prosecution has to prove in assault is an intention to use or threaten actual force unlawfully and without the consent of the victim. It follows that if a man believes that what he is doing is not unlawful it avails him just as much as if he believes that he has the consent of his victim.

The further contention is that to make the difference between the objective and subjective test of mistake depend on where the evidential burden lies is unreal and illogical. At the end of the evidence all the facts are before the tribunal of fact which has then to direct itself or be directed as to the burden of proof and (with few exceptions) in respect of common law offences that burden lies on the prosecution. It matters not where the evidence has come from nor whether any issue has been specifically raised; if it is an issue the resolution of which in

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the defendant's favour would be to his advantage it must be left to the jury (or magistrates must consider it): see *R v Porritt* (8).

Support for the contention that the question whether the subjective or objective test should be applied does not depend on where the evidential burden as to any issue lies can be found in the comparatively recent decision of the Court of Appeal, Criminal Division, in *R v Smith* (18). In that case the court held that a person who damages property belonging to another has a defence to a charge under the Criminal Damage Act, 1971, if he does so in the mistaken belief that the property is his own whether that belief is a justifiable one or not. That decision did not depend on the particular provisions of the 1971 Act but on a general principle of the criminal law:

'Applying the ordinary principles of mens rea, the intention and recklessness and the absence of lawful excuse required to constitute the offence have reference to property belonging to another.'

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In his comment on the Court of Appeal decision on *Morgan* (9), Professor Smith writes:

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'The one clear decision requiring reasonable grounds among the cases cited is *R v King* (19), where a conviction for bigamy was upheld because the accused did not have reasonable grounds for his belief. This, however, might be matched by the recent decision of the Court of Appeal in *R v Smith* (18) where it was held that a person who damages property belonging to another has a defence to a charge under the Criminal Damage Act, 1971, if he does so in the honest but mistaken belief that the property is his own. The court stated, ". . . provided that the belief is honestly held it is irrelevant to consider whether or not it is a justifiable belief." It is very important to notice that this decision does not depend on the particular provisions of the Criminal Damage Act but on a general principle of the criminal law: "Applying the ordinary principles of mens rea, the intention and recklessness and the absence of lawful excuse required to constitute the offence have reference to property belonging to another." It is submitted that equally in the present case the intention or recklessness required have reference to sexual intercourse *without consent*. An intention to damage one's own property is not a mens rea under the Criminal Damage Act because the result intended is not an offence. Similarly an intention to have intercourse with a consenting woman is not mens rea because the result intended is not an offence. The ordinary principles of mens rea should certainly be no less applicable to the

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(8) 125 JP 605; [1961] 1 WLR 1372

(9) 139 JP 476; [1976] AC 182

(18) 138 JP 236; [1974] 1 All ER 632

(19) [1963] 3 All ER 561; [1964] 1 QB 285

common law offence of rape than to the statutory offence of criminal damage. The court distinguished between cases where the evidential burden rests on the accused and those where it rests on the Crown. It is in the former class of case that it is for accused to show reasonable grounds for belief. This is inconsistent with *R v Smith* (18). Once the prosecution proved that the accused deliberately damaged property and that the property in fact belonged to another, they had made out a *prima facie* case and it was for the accused to introduce evidence (i.e. there was an evidential burden on him) that he believed that the property was his. According to the present case, he should therefore have had the burden of showing that this belief was based on reasonable grounds. Apart altogether from this case, however, it is respectfully submitted that the proposed distinction is unworkable. Although it is often stated the evidential burden of making out particular defences is on the accused, this, though a convenient generalisation, is not a rule of law. Whether there is an evidential burden on the accused depends on the course which the evidence takes in the particular case. The accused who wishes to set up the defence of provocation or self-defence will normally have the evidential burden of doing so; but if facts emerge in the course of the prosecution's own evidence which are capable of amounting to either of these defences (or indeed any other defence) then the defence in question must be left to the jury: *Mancini v D.P.P.* (20); *Palmer v R.* (21). The accused has incurred no evidential burden and, consequently, may have done nothing which could have satisfied such a burden had it existed. If the defence depends on a mistake of fact, is it really to be said that this must be a reasonable mistake if the accused introduced the evidence, but not if the prosecution introduced it? With respect, it is submitted that there is no connection between the incidence of the evidential burden and the question whether the mistake must be reasonable.'

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I agree with the criticism voiced by Professor Smith in that passage and I do not think that the test whether the objective or subjective test of mistake applies can depend on where in respect of the relevant issue the evidential burden lies or may, in any particular case, lie.

But in my judgment counsel's ingenious argument for the appellant fails at an earlier stage. It does not seem to me that the element of unlawfulness can properly be regarded as part of the definitional elements of the offence. In defining a criminal offence the word 'unlawful' is surely tautologous and can add nothing to its essential ingredients. The requirement in the Criminal Damage Act, 1971, that the property should be that of another is however clearly part of the definition of the statutory offence. It seems to me that the law is that one has to distinguish between the mens rea required for the basic elements of

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(18) 138 JP 605; [1961] 1 WLR 1372
 (20) [1941] 3 All ER 272; [1942] AC 1
 (21) [1971] All ER 1077; [1971] AC 814

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the offence and that required for a defence. In the absence of express words in any offence created by statute (eg the Criminal Damage Act, 1971, s.5) where the issue is whether a defence is made out then mistake avails a defendant nothing if it is an unreasonable (and therefore negligent) one. And, no matter how strange it may seem that a defendant charged with assault can escape conviction if he shows that he mistakenly but unreasonably thought his victim was consenting but not if he was in the same state of mind whether his victim had a right to detain him, that in my judgment is the law.

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That being so this appeal fails, and I would answer the questions we are asked as follows. (i) A constable who reasonably believes that a breach of the peace is about to take place is entitled to restrain a person without arrest if such is necessary to prevent a breach of the peace. In answering that question I have intentionally used the word 'restrain' rather than 'detain'. In the circumstances of this case the two words mean the same. I have used 'restrain' to make it clear that I look on the restraint as being a step which the officer was entitled to take to prevent a breach of the peace and not as a detention primarily aimed at depriving a man of his liberty. (ii) A person being restrained in the circumstances found by the magistrates to exist who does not accept that the person restraining him is a constable may be convicted of assault on a constable in the execution of his duty if he uses no more force than is reasonably necessary to protect himself from what he mistakenly and without reasonable grounds believes to be an unjustified assault and false imprisonment.

I would only add this. In *Morgan* (9) Lord Edmund-Davies felt that he was constrained by authority to dismiss the appeal, but he felt strongly that the law (as he would have held it to be) ought to be changed. However he thought that, if change was to come, it should be brought about by legislation. He referred to a passage from Smith and Hogan, *Criminal Law* (3rd edn, p. 150):

'It is now established by s.8 of the Criminal Justice Act, 1967, that a failure to foresee the material results of one's conduct is a defence whether reasonable or not. It is odd that a different rule should prevail with respect to circumstances, the more particularly since foresight of results frequently depends on knowledge of circumstances . . . Such a distinction seems unjustifiable. Its existence points in favour of a rule allowing as a defence any honest mistake which negatives mens rea, whether reasonable or not.'

In March, 1980, the Criminal Law Revision Committee (of which Lord Edmund-Davies was, for many years, chairman) published its 14th report, *Offences Against the Person* (Cmnd 7844). The committee considered self-defence (paras 281 – 288). Their proposal is summarised in Part IX. It recommends adoption of the subjective test. Paragraph 72 a reads:

'The common law defence of self-defence should be replaced by a statutory defence providing that a person may use such force as is reasonable in the circumstances as he believes them to be in the defence of himself or any other person, or in the defence of his property or that of any other person.'

Paragraph 72 (c) reads:

'There should be a provision that, in considering whether the defendant believed he or another or his property or that of another was under attack, the presence or absence of reasonable grounds for such a belief is a matter to which the court or jury is to have regard in conjunction with any other relevant matters.'

DONALDSON, LJ.: I agree. On the law as it stands at the present it is no defence to a charge of assault that the accused honestly but mistakenly believed that circumstances existed which would have justified his action as being undertaken in reasonable self-defence unless there are reasonable grounds for that belief. However, an ill-founded but completely honest and genuine belief removes all or much of the culpability involved in the offence. It therefore provides powerful mitigation and in an appropriate case would justify a court granting an absolute discharge.

Note: *The Appeal Committee of the House of Lords has granted leave to appeal.*

Solicitors: Somers & Leyne; R.E.T. Birch.

Reported by G. F. L. Bridgman, Esq., Barrister.

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R. v. Fairbairn

Court of Appeal

COURT OF APPEAL
(Stocker, J., and Glidewell, J.)
October 2, 1980

R. v. FAIRBAIRN

Criminal Law – Penalty – Fine – Amount – Determination in relation to gravity of offence – Theft from employer.

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The appellant was convicted on an indictment containing eight counts alleging theft of property of a total value of between £600 and £700. Seven of the counts charged theft during his employment by British Rail and one was a general charge of theft of property the owners of which were not known. The appellant was sentenced to nine months imprisonment and he was fined £7,500. On appeal,

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Held: the amount of a fine should be determined in relation to the gravity of the offence in respect of which it was imposed and only then should the offender's means be considered to decide whether he had the capacity to pay such an amount: in the present case the amount of the fine was over ten times the value of the goods stolen and that sum was out of scale in relation to the gravity of the offence of which the appellant was convicted: serious though theft from an employer was and easy to commit, the fine would be reduced to £1000, with 28 days in which to pay it, and a further nine months' imprisonment in default of payment.

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Appeal by Prince Alfred Fairbairn against sentence passed on him on his conviction of theft at the Central Criminal Court.

B. M. McIntyre for the appellant.

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GLIDEWELL, J: On the 27th June, 1980, at the Central Criminal Court the appellant was convicted on an indictment containing eight counts alleging theft. Seven of them were theft during the course of his employment by British Rail and one was a general charge of theft of property the owner of which was not known, on which he was convicted by the jury only in respect of a part of the property specified in that count. The sentence passed by the learned judge was one of nine months' imprisonment, together with a fine of £7,500 to be paid within six months, with a further nine months' imprisonment consecutive in default of payment. There was no separate penalty imposed on any of the other counts. The appellant appeals against that sentence by leave of the single judge, and it was immediately made clear by his learned counsel that the appeal was solely in respect of the amount of the fine.

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The appellant was employed by British Rail at Liverpool Street Station, London having been in that employment since October, 1975. Part of his duties were to move barrow loads of parcels and load them into trains at the station. The seven counts related to theft of such parcels over a period from February to October, 1978, when he was arrested. The goods stolen were mostly mechanical household goods, such as a typewriter, a sewing machine, stereo equipment, and the like. Together with the goods in the eighth count, in respect of which he was convicted, they had a total value of something between £600 and £700.

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The appellant is now aged 49. He is a married man with four teenage children. He has one relevant previous conviction for theft of goods worth some £15 from previous employers. That was in 1975 and in respect of that he was fined £60. During the trial evidence was given as to the appellant's financial means, and it appears that he owns two houses, one of which is a house in Peterborough where he and his family formerly used to live. That is free of any mortgage or other encumbrance.

After his conviction, his learned counsel suggested in mitigation that, if he were fined instead of an immediate sentence of imprisonment being imposed (though counsel, I think, at that time was accepting that a suspended sentence might well be imposed), he would be able to borrow in order to enable him to pay the fine quite apart from the background of the evidence as to his financial means. Where an employee in a position of trust as was this appellant, is found guilty of theft, an immediate prison sentence is usually thought a proper penalty, and counsel does not suggest otherwise in this case.

In the circumstances of this case, a fine was also, in the view of the court, appropriate, but the issue in this appeal has been the amount of the fine. The learned judge in sentencing expressed some suspicion that the appellant had been stealing goods entrusted to British Rail for a much longer period of time than that to which the offences in the indictment related, but he made it clear that he was sentencing the appellant only for the offences of which the appellant had been convicted and not on any basis of suspicion of earlier offences. In the view of this court the fine of £7,500 was excessive. In principle, the amount of the fine should be determined in relation to the gravity of the offence, and then – and only then – should the offender's means be considered to decide whether he has the capacity to pay such an amount. In this case the amount of the fine was over ten times the value of the goods stolen, and in this court's view that amount is out of scale in relation to the gravity of the offence of which he was convicted, serious though theft from his employers, particularly theft which is easy to commit such as this, is. Accordingly, the court allows the appeal to the extent of reducing the fine to one of £1,000. The order in relation to the imprisonment remains unchanged – that is to say, the nine months' imprisonment imposed is unchanged, and the fine is reduced to £1,000, with 28 days to pay and a further nine months' imprisonment consecutive in default of payment.

Reported by G.F.L. Bridgman, Esq., Barrister.

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QUEEN'S BENCH DIVISION
(Donaldson, L.J., Forbes, J., and Bingham, J.)
February 25, 1981

R. v. BIRMINGHAM JUSTICES. EX PARTE D.W. PARKIN
CONSTRUCTION LTD. AND OTHERS

R. v. GATESHEAD JUSTICES. EX PARTE TESCO STORES LTD.

Magistrates — Information — Need to be laid before magistrates — Consideration of information — Responsibility of magistrates — Essential contents of information — No delegation of judicial function.

In two cases the applicants, who had been convicted by justices of statutory offences, applied for judicial review and orders quashing their convictions.

Held: an information is not "laid" within the meaning of the Magistrates' Courts Act, 1952, and is certainly not "laid before a justice of the peace" unless it is laid before and is considered by either a justice of the peace or the clerk to the justices acting as a justice of the peace pursuant to the Justices' Clerks Rules, and no summons can be issued by any other person or without a prior judicial consideration by that person of the information on which the summons is based; where an information was "laid" before and considered by an assistant of the justices' clerk, who was no doubt senior and competent but was not the clerk to the justices and, so far as was known, was not qualified for that office, the justices acted without jurisdiction in trying the information and their decision would be quashed; the requirement that a justice of the peace or the clerk to the justices acting as a justice shall take personal responsibility for taking so serious a step as to require the attendance of a citizen before a criminal court was a constitutional safeguard of fundamental importance; every information must be examined to ascertain (i) that an offence known to the law was alleged; (ii) that the information was not out of time; (iii) that the court had jurisdiction, and (iv) that the informant had any necessary authority to prosecute; it had been submitted that as s.19 of the Justices of the Peace Act, 1949, that a clerk to justices should have a staff to work under his direction and s.118 of the Magistrates' Courts Act, 1952, contemplated that there might be more than one clerk for a petty sessional area, the statutory framework clearly involved a degree of delegation by the clerk, but the clerk had many non-judicial duties and there was no reason whatever for concluding that he alone in the whole judicial system was empowered to delegate his judicial functions; as to the burden of work arising from the need that each information must be considered and each summons authorized by a justice or justices' clerk and each must bear the signature of the person who considered the information, their task could be considerably lightened by suitable administrative assistance.

Applications for judicial review and orders quashing the convictions of the applicants by Birmingham and Gateshead justices.

M.K. Lee for D.W. Parkin Construction Ltd.
W.R.H. Crowther, Q.C. and D. Paton for Tesco Stores Ltd.
R. Wakerley for Birmingham and Gateshead justices.
S.D. Brown for Department of Health and Social Security.

DONALDSON L.J. The judgment which I am about to read is that of the court. On 19th January, 1977, D.W. Parkin Construction Ltd., failed to pay a class 1 contribution due under the Social Security Act, 1975, in respect of a Mr. Brian King, and, in consequence, on 2nd October, 1979, the company was convicted by the Birmingham justices of an offence contrary to s.146 of that Act. On 17th August, 1978, Mrs. Eileen Thomas went to the supermarket of Tesco Stores Ltd. in Ellison Street, Gateshead, and was sold a packet of biscuits. One of the biscuits contained a cigarette filter tip, and, in consequence, on 15th June, 1979, Tesco were convicted by the Gateshead justices of an offence under the Food and Drugs Act, 1955. The common factor between these cases may not be readily apparent. It is an allegation that in neither case had the justices any jurisdiction to adjudicate because at no material time were the informations laid before a person authorized to consider them.

We say "at no material time" because *R. v. Brentwood Justices, Ex parte Catlin* (1), is authority for the proposition that the appearance of the defendant before the court can and usually will remedy any prior deficiencies with regard to the laying of an information or the making of a complaint or the issue of a summons, since the production of the purported summons to the magistrate in court will usually itself meet the requirement for laying an information or making a complaint and the presence of the defendant renders the summons unnecessary. But this is not true where, as in the instant cases, the defendant first appears before the court after the expiry of the time limited by statute for the laying of the information. In the case of D.W. Parkin Construction Ltd., the relevant statutory provision was s.147 of the Social Security Act, 1975, the time limit was twelve months from the date of the offence, and this expired on 18th January, 1978, whereas the appearance before the justices was on 2nd October, 1979. In the case of Tesco Stores Ltd., the time limit was six months from the date of the offence and this expired on 14th February, 1979, whereas the appearance before the justices was on 15th June, 1979. Each of the applicants now applies for judicial review and for orders quashing their respective convictions.

D.W. Parkin Construction Ltd.

On 15th December, 1977, Mr. Brian Thomas of the Department of Health and Social Security delivered a written information to the Birmingham magistrates' court alleging the offence under the Social Security Act, 1975. It is not certain who considered it. The information itself bears the facsimile signature of Mr. Mountford, the clerk to the Birmingham justices, but this is not of itself indicative of the fact that it was ever considered or seen by Mr. Mountford. Mr. Mountford's account of the matter is as follows:—

"I am satisfied that Mr. Brian Thomas applied to the court clerk responsible for the issue of process on the 15th December, 1977, for the sole purpose of laying this information. Whether this infor-

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mation was later submitted to me, I do not know. My attention is given to some informations, others are dealt with by senior members of my staff on my instructions. However, irrespective of whether I personally considered this information or whether it was considered by a senior and competent member of my staff acting under my specific direction, authority, and control, followed by the signing of the information (by way of affixing the facsimile of my signature, whether by me or a senior officer authorized on that behalf by me) in my opinion it is correctly laid. Following *R. v. Brentford Justices*. *Ex parte Catlin* (1) I was advised that the procedure of granting process which we now operate is legally correct, and in my opinion, this information is in order".

In saying that he was so advised, Mr. Mountford was referring to a circular issued in 1975 by the council of the Society of Justices' Clerks. This circular, so far as is material provided as follows:-

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"... every information must, at the very least, be examined to ascertain: (i) that an offence known to law is alleged, and (ii) that it is not out of time, and (iii) that the court has jurisdiction, and (iv) that the informant has any necessary authority to prosecute.

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"This examination of every information and the subsequent action to complete the grant of process may be done in one of four ways: Grant of summons by a justice of the peace or the justices' clerk (a) by a justice personally with the justices' clerk or a well qualified assistant to assist him; or (b) by the justices' clerk personally; or (c) by a justices' clerk's assistant who then presents the informations to a justice or the justices' clerk and states formally that they are in order, so the justice or justices' clerk can formally receive the informations and authorize the grant of process; the process will either be signed by the justice or justices' clerk, or the assistant will be given authority to affix the facsimile signature stamp of the justice or justices' clerk;

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"Grant of summons by the justices' clerk only: (d) by a senior and competent justices' clerk's assistant (the assistant shall sign in the name of the clerk or affix a facsimile of the clerk's signature to the summons) acting without the immediate personal involvement of the justices' clerk, but only under his specific direction, authority and control".

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Tesco Stores Ltd.

On 6th February, 1979, the Director of Legal Services for the borough council of Gateshead posted an information to the clerk to the Gateshead justices. This was collected from the post office on 7th February by Mr. T. Cook. Mr. Cook was a junior assistant of the clerk to the justices, Mr. John Griffiths. What happened next was the subject of an investigation by Mr. Griffiths. He was faced with the problem that this was merely one of many informations but we accept his conclusions as being likely to be correct. He says that the infor-

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mation would have been given to a Mr. J. White on the same day. Mr. White was the listing officer and one of Mr. Griffiths' senior assistants, especially authorized by him to examine and to accept or reject informations upon Mr. Griffiths' behalf. Mr. White considered the information and decided that it was in order. He then passed it to another of Mr. Griffiths' assistants, Mr. C. Smith, for him to type and issue the summons. It is impossible to say quite when Mr. White considered the information, but it must have been on or before 16th February, 1979, because thereafter he was on leave. In the normal course of events he would have noted the date on the information, but this was omitted in this instance. By an unfortunate accident Mr. Smith when issuing the summons showed the information as being laid on 19th February, 1979, that being the date when he received the information and thereafter changed this to 6th February, 1979, which was the date on which it was signed by the director of legal services. Clearly neither date is correct since an information is laid when it is considered by a person authorized to do so. The only relevance of the fact that wrong dates were mentioned is that it put Tesco on inquiry and these proceedings ensued. Mr. Griffiths, like Mr. Mountford, relied upon the circular from the council of the Society of Justices' Clerks in establishing this procedure for dealing with informations.

The laying of informations and the issue of summonses.

We now turn to consider the problem which is central to these applications, namely, before whom may informations be laid and who is empowered to decide whether or not to issue summonses.

By s.1 of the Magistrates' Courts Act, 1952:

"Issue of summons to accused or warrant for his arrest. (1) Upon an information being laid before a justice of the peace for any county that any person has, or is suspected of having, committed an offence, the justice may, in any of the events mentioned in subs.(2) of this section — (a) issue a summons directed to that person requiring him to appear before a magistrates' court for the county or borough to answer to the information . . .

"(2) A justice of the peace for a county or borough may issue a summons or warrant under this section — (a) if the offence was committed or is suspected to have been committed within the county or borough; or (b) if it appears to the justice necessary or expedient, with a view to the better administration of justice, that the person charged should be tried jointly with, or in the same place as, some other person who is charged with an offence, and who is in custody, or is being or is to be proceeded against, within the county or borough; or (c) if the person charged resides or is, or is believed to reside or be, within the county or borough; or (d) if under any enactment a magistrates' court for the county or borough has jurisdiction to try the offence; (e) if the offence was committed outside England and Wales. Provided that where the offence charged is not an indictable offence —

"(i) a summons shall not be issued by virtue only of para. (c) of this subsection . . .".

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In 1952 there was no other authority for anyone to consider informations or complaints or to issue summonses. The wording of the section "may . . . issue a summons" and "if it appears to the justice necessary or expedient with a view to the better administration of justice" makes it clear that the power was discretionary and that the discretion had to be exercised by the justice acting judicially and therefore personally, since the judicial function can never be delegated. This is in line with the law as it was prior to the enactment of the 1952 Act. In *Dixon v. Wells* (2) a summons was held to be invalid when the complaint was considered by two justices and the summons was signed by a third justice who had not considered the complaint. It is not uninteresting in the context of the present applications to find Lord Coleridge, C.J. saying:

"It is said that it has become a general practice for the magistrate's clerk to hear complaints without any written or other information, fill up a form of summons, obtain the signature of any magistrate, and so cause a man to be summoned, and perhaps exposed to a heavy penalty, although the magistrate signing the summons may not have ascertained whether there was a *prima facie* case against the person summoned. If it be, indeed, the practice to sign a summons without hearing an information, and for one person to hear the information and another to sign the summons, a practice more loose or likely to lead to injustice, especially in matters relating to perishable articles which require to be dealt with quickly, I can hardly conceive. In the present case, if the magistrate who signed the summons had heard the information, he might have thought that no *prima facie* case had been made out, and have declined to issue the summons".

The same point was made in *R. v. Brentford Justices. Ex parte Catlin* (1) by Lord Widgery, C.J. when he said:

"It must, however, be remembered that before a summons or warrant is issued the information must be laid before a justice and he must go through the judicial exercise of deciding whether a summons or warrant ought to be issued or not. If a justice authorizes the issue of a summons without having applied his mind to the information then he is guilty of dereliction of duty and if in any particular justices' clerk's office a practice goes on of summonses being issued without an information being laid before the justice at all, then a very serious instance of maladministration arises which should have the attention of the authorities without delay".

In 1970 a change was made. It may well be that this change was prompted by the increasing work load of the justices and that a further

(1) 139 JP 516; [1975] 2 All ER 201

(2) (1890), 54 JP 725; 25 QBD 249

change is now due. However that may be, in 1970 the Lord Chancellor made the Justices' Clerks Rules. These rules were made under s.15 of the Justices of the Peace Act, 1949, as extended by s.5 of the Justices of the Peace Act, 1968. The power under the 1949 Act was limited to making "rules for regulating and prescribing the procedure and practice to be followed in magistrates courts and by justices clerks". A justices' clerk was defined by s.44, not very helpfully, as "a clerk to the justices for a petty sessions area", but the Act, by s.20 also prescribed qualifications for new candidates for the office of a justices' clerk as those of a barrister or solicitor of not less than five years standing. The 1968 Act extended this power —

"to make provision enabling things authorized to be done by, to or before a single justice of the peace, to be done instead by, to or before a justices' clerk; and any enactment or rule of law regulating the exercise of any jurisdiction or powers of the peace, or relating to things done in the exercise or purported exercise thereof, shall apply in relation to the exercise or purported exercise thereof by virtue of this subsection by the clerk to any justices as if he were one of those justices".

The Justices' Clerks Rules, 1970, were in the following terms:

"3. The things specified in the schedule to these rules, being things authorized to be done by, to or before a single justice of the peace for a petty sessions area may be done by, to or before a justices' clerk for that area".

"[In parenthesis we should add that whilst there was power under section 19 of the Justices of the Peace Act, 1949, and now under section 25 of the 1975 Act, to appoint more than one justices' clerk for a particular area, each of whom would be *the* justices' clerk for this purpose, no such appointment appears to have been made in the case of the Birmingham and Gateshead areas"].

By the schedule:

1. The laying of an information or the making of a complaint other than an information or complaint substantiated on oath.
2. The issue of any summons, including a witness summons".

For the applicants it is submitted that reading the rules with the enabling power, it is clear that the only person authorised to act as a justice of the peace, although he is not one, is *the* clerk to the justices for the area, i.e., Mr. Mountford in relation to the Birmingham area and Mr. Griffiths in relation to the Gateshead area. Furthermore, since the clerk is acting as a justice, he must act personally and cannot delegate any of his duties or dispositions.

An information is not "laid" within the meaning of the Magistrates Courts Act, 1952, and is certainly not "laid before a justice of the

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"peace" unless it is laid before and considered by either a justice of the peace or the clerk to the justices acting as a justice of the peace pursuant to the Justices' Clerks Rules, 1970, and, incidentally, no summons can be issued by any other person or without a prior judicial consideration by that person of the information upon which the summons is based. In the case of D.W. Parkin Construction Ltd., the information was "laid" before and considered by one or other of two unidentified assistants of Mr. Mountford, who were no doubt senior and competent but were not *the* clerk to the justices, nor, so far as is known, even qualified for that office. In the case of Tesco Stores Ltd., the information was "laid" before and considered by Mr. White, to whom the same considerations apply. It follows, as the applicants submit, that the Birmingham and Gateshead justices acted without jurisdiction in trying the informations and that their decisions should be quashed.

Three arguments to the contrary are advanced on behalf of the prosecutors and the justices. First, it is submitted that in reality the consideration of an information and the issue of a summons is normally a purely administrative function and that it is only in an insignificant minority of cases that there is really anything to consider or any materials upon which a judicial discretion could be exercised. We would accept that it is rare for the issue of a summons to be refused but it does happen from time to time and rightly so. No doubt most prosecutions are brought by experienced and responsible prosecuting authorities who are well aware of the requirements of the law and take pains to make sure that the informations are in order and that the cases are fit to be tried. But not all prosecutions are brought by experienced and responsible prosecuting authorities. And even in the case of such authorities, the requirement that a justice of the peace or the clerk to the justices acting as a justice of the peace shall take personal responsibility for the propriety of taking so serious a step as to require the attendance of a citizen before a criminal court is a constitutional safeguard of fundamental importance. We have no doubt that this function is judicial. We agree with that part of the advice of the council of the Society of Justices' Clerks which affirms that every information must at the very least be examined to ascertain: (i) that an offence known to law is alleged, and (ii) that it is not out of time, and (iii) that the court has jurisdiction, and (iv) that the informant has any necessary authority to prosecute. This is not an administrative function and still less is it a purely clerical function which is really what is implied in this submission.

Secondly, it is submitted that since s.19 of the Justices of the Peace Act, 1949, contemplates that the clerk to the justices shall have a staff who would work under his direction and s.118 of the Magistrates Courts Act, 1952, contemplates that there may be more than one clerk to the justices for a petty sessional area, one being treated as the deputy to the other, the statutory framework clearly involves a degree of delegation by the clerk. We agree, but the clerk has many non-judicial duties and, in the absence of the clearest possible words, there is no reason whatsoever for concluding that he alone in the whole judicial system is empowered to delegate his judicial functions.

Thirdly, it is submitted that if the applicants are correct in their submissions, the administration of justice will grind to a halt because justices and clerks to justices, if unassisted, cannot possibly process the number of informations and complaints now being laid and made. In this context we were referred to evidence given to the Royal Commission on Criminal Procedure which suggests that in some parts of the country the process of delegation has been taken to the point where there is a degree of integration between the police and the staff of the magistrates courts, the police preparing the paper work not only in connection with the informations laid by them but also in relation to the corresponding summonses. The short answer to this is that if the practice is unlawful, expediency will not make it lawful. *Fiat justitia ruat coelum.* The long answer is that we doubt whether the system would grind to a halt, although it would undoubtedly be subjected to severe strain. Although each information must be considered and each summons must be authorized individually by a justice or by the justices' clerk, or where more than one by one of the justices' clerks, and each must bear the signature of the person who considered the information, their task can be considerably lightened by suitable administrative assistance. Thus batches of informations having similar characteristics, e.g., those emanating from the offices of specialist prosecutors such as trading standards officers, can be assembled and placed before a single individual, thus lightening the task of consideration. Again unusual informations either in terms of the nature of the offence or of the facts alleged can be identified by assistants to the clerk to the justices and placed before him or before specially qualified or experienced justices for consideration. And the task of signing can be performed vicariously by the use of a facsimile signature on a rubber stamp (*R. v. Brentford Justices. Ex parte Catlin* (1)). Bundles of informations and summonses can be considered by a justice or by the clerk to the justices and, thereafter, authority can be given for others to affix the signature of the person who has considered the informations and authorized the issue of the summonses.

The advice given by the Council of the Society of Justices' Clerks was, we are told, approved informally before it was issued and until these applications were made there was no suggestion that it was misconceived. In the circumstances it was natural that the clerks to the Birmingham and Gateshead justices should have organized their offices in the way revealed by these applications and we do not doubt that many, and possibly most, other clerks to justices do likewise, particularly in petty sessional divisions with a large case load. But that said, we have no doubt that this advice was misconceived and should no longer be followed.

One other thing should be said. Our judgment, if accepted, or affirmed on any appeal, must lead to a major re-organization in the practices of magistrates courts, but this is not to say that many or any defendants other than the applicants can complain that they were convicted without jurisdiction. Such a complaint could only be made

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where the defendant appeared before the court after the expiry of the time limit for trying an information and then only if it appeared that the information had not in fact been considered by a qualified person. It will be difficult, if not impossible, now to discover whether this was the case unless, as happened here, those who complained took the point upon the occasion of their appearance in court.

Solicitors: *Sidney Mitchell & Co; Alsop, Stevens, Batesons & Co; F.H. Wilson; Basil P. Mellon & Co; Sharpe, Pritchard & Co*, for *Peter Parkes*, Gateshead; Solicitor to Department of Health & Social Security.

Reported by G.F.L. Bridgman, Esq., Barrister.

QUEEN'S BENCH DIVISION
(Donaldson, L.J., and Bingham, J.)

February 6, 1981

CHIEF CONSTABLE OF STAFFORDSHIRE v. LEES

Road Traffic – Breath test – Accident – Driver deliberately driving into gate – Road Traffic Act, 1972, s.8(2).

By s.8(2) of the Road Traffic Act, 1972: "if an accident occurs owing to the presence of a motor vehicle on a road or other public place a constable in uniform may require any person who he has reasonable cause to believe was driving the vehicle at the time of the accident to provide a specimen of breath for a breath test . . ."

The respondent, driving a car and faced with a locked gate, deliberately drove the car at it and broke it down. Thereafter the police required him to provide a specimen of breath under s.8(2) (supra) and he was charged before justices with having failed to supply a specimen of breath, damaging the gate, and assaulting the police. He contended that s.8(2) did not apply as he had deliberately driven at the gate and therefore there had been no accident. The justices dismissed the charges against the respondent, and the prosecutor appealed.

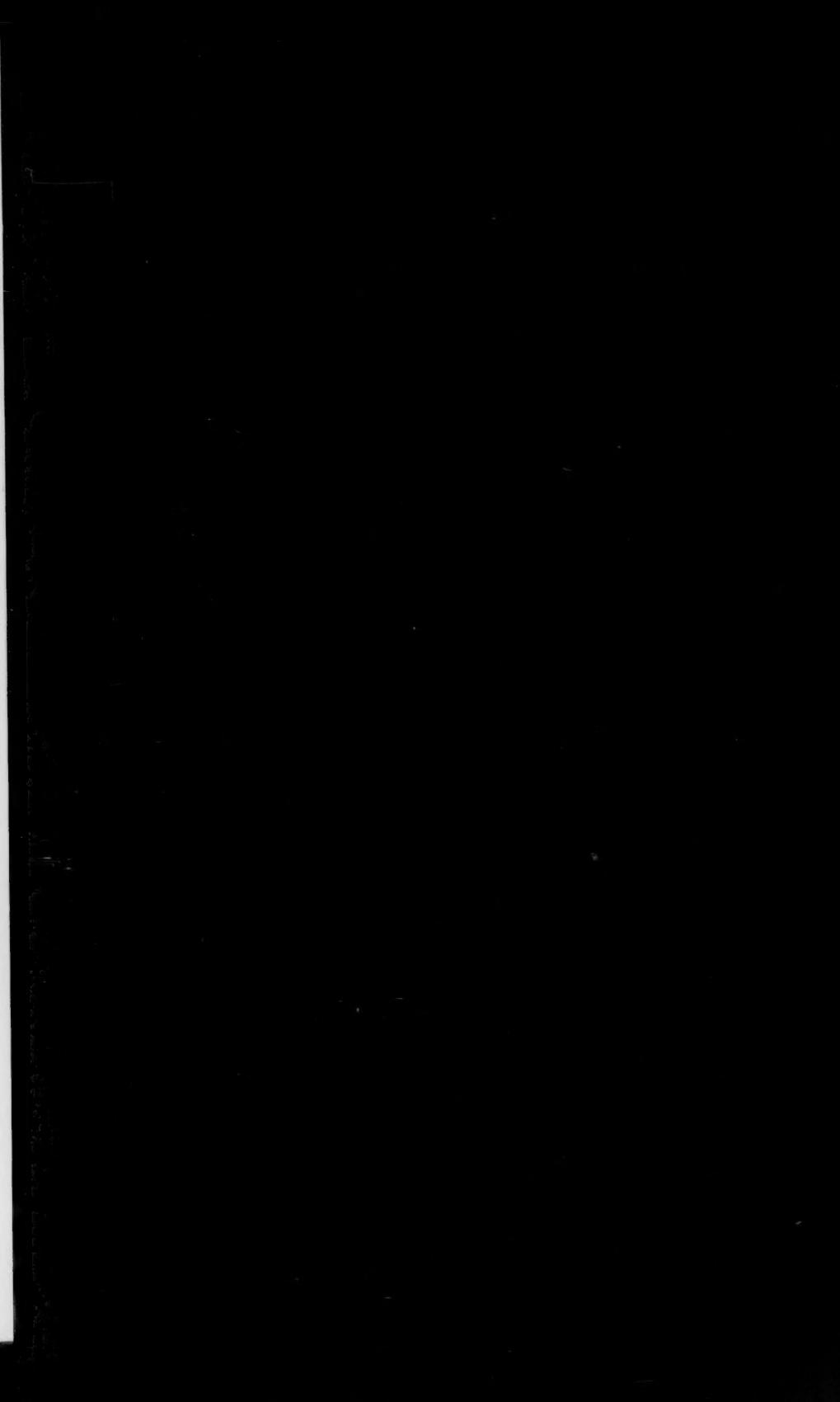
Held: giving the word "accident" its ordinary meaning, the case clearly came within s.8(2), the appeal would be allowed, and the case would be remitted to the justices.

Case Stated by Cannock justices.

A. Baker for the appellant.

The respondent was not represented.

DONALDSON, L.J.: This is a prosecutor's appeal by Case Stated from a decision of the justices for the county of Stafford sitting at Cannock, who dismissed two breathalyser charges against the respondent, Roy Lees.





The facts were these. On the evening of 4th February, 1979, the respondent and three other men were drinking in a public house at Chasetown. At closing time they offered two girls a lift home, which was accepted. The respondent did not take the girls home, but drove his Range Rover car to a public car park at Castle Ring. That car park Abuts on Cannock Chase and is separated from it by a wooden fence. a gate, which was padlocked at the time, allows access to the Chase for Forestry Commission vehicles, and there is a kissing gate which allows the public to enter the Chase on foot. The respondent, faced with the locked gate, deliberately drove his car at it, smashed it down and drove through, but got stuck on the boggy slope beyond the gate. The police were called and the respondent ran off. It was some little while later that the police were able to start the breathalyser procedures. They were obliged, therefore, to rely upon that part of s.8 of the Road Traffic Act, 1972, which is operative if there has been an accident. The respondent's defence was simple in the extreme: "I deliberately drove into the locked gate. Therefore there was no accident". That construction of the section appealed to the justices, and for that reason, and, so far as I can see, for that reason only, they dismissed these two charges.

The justices had quoted to them the decision of the Court of Appeal (Criminal Division) in *R. v. Morris* (1), in which Lord Widgery, C.J., said:

"The court is of the opinion that the word 'accident' in s.2(2) should as far as possible be given its ordinary rather than a technical meaning. The word 'accident', unhappily, is well known in the context of road use and motor cars, and we would deplore any technical meaning being attached to this simple, ordinary word in the context in which it appears. It is evident that the accident referred to in the subsection is something which can happen when a person is driving or attempting to drive a car, and furthermore that it must be an accident which occurs owing to the presence of a motor vehicle on a road."

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He went on to discuss various meanings of the word, including a meaning which had been canvassed by Sachs, L.J., in argument, as being "an unintended occurrence which has an adverse physical result". In the context of *Morris's* case that may well have been a satisfactory view of the meaning of the word, and it was undoubtedly adopted by the court for that purpose.

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But the matter had to be considered again in *R. v. Billingham* (2) a decision of this court. There the accused took the brake off a police car at the top of a hill, and gravity took over causing a great deal of damage to the car on the way. It is true that that court seems to have taken a somewhat generous view as to what the accused intended, and to that extent perhaps may not have contributed to the decision about the meaning of the word "accident". For my part I am very

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(1) 56 Cr. App R 175

(2) [1979] RTR 446

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impressed with what Bridge, L.J., said when, having considered *Morris's* case, he said:

"in effect, we are asked in the present case by the defendant to hold, as no doubt the justices were in the court below, that that definition ought to be read as if it were written into the statute., but that does not seem to me to be an appropriate use of authority."

i Later he said:

"Taking other examples before coming to the particular instance here, it is quite clear in my judgment, instancing one of the examples mentioned by Earl Loreburn in *Board of Management of Trim Joint District School v. Kelly* (3) that if mischievous persons place an obstruction on a railway line, and in the result a train is derailed, any ordinary person would say there had been a railway accident. Also, to take an example which was given by Mr. Wakerley in the course of argument in the present case, if a drunken driver deliberately drives into the back of another car, again I think that any ordinary person would say that there had been an accident occurring owing to the presence of a motor vehicle on a road."

That is precisely what happened in this case. I would respectfully agree with Bridge, L.J., that this is a case which clearly comes within the statute. I would allow the appeal and remit the case to the justices.

BINGHAM, J.: I agree. It would be an insult to commonsense if a collision involving a motor car arising from some careless and inadvertent act entitled a constable to exercise his powers under the Act but a similar result caused by a deliberate anti-social act did not. Previous cases have made it clear that one should look at the ordinary meaning of the word "accident", and it is relevant to note that in the Oxford English Dictionary, among other meanings, is to be found "an unfortunate event, a mishap", which definition, it seems to me, is wide enough to include an event not occurring in the ordinary course, of such a nature as in this case. I might perhaps add that in speaking of "moving accidents by flood and field" Othello was, I think, referring to intentional as well as fortuitous events of which he had been the unhappy subject.

Appeal allowed.

Counsel: *A. Barker* for the appellant.

Solicitors: *Addison, Cooper, Jesson & Co.*, Walsall.

Reported by G. F. L. Bridgman, Esq., Barrister.

(3) [1914] AC 667

HOUSE OF LORDS

(Lord Wilberforce, Lord Diplock, Lord Edmund-Davies,
Lord Keith of Kinkel, and Lord Roskill)
March 19, 1981

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R. v. CALDWELL

House of Lords

Criminal Law – Arson – Defence – Self-induced drunkenness – Criminal Damage Act, 1971, s.1(1), s.1(2).

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The respondent considered that he had a grievance against the proprietor of a hotel, and one night when he had got very drunk he started a fire on the ground floor of the hotel which was extinguished before any serious damage was done or any injury was suffered by any of the guests who were in the hotel at the time. He was charged with offences under s.1(1) and (2) of the Criminal Damage Act, 1971. He relied on his self-induced drunkenness as a defence to the charge under s.1(2) of the Act of 1971 and pleaded guilty to the charge under s.1(1). The recorder directed the jury that self-induced drunkenness was not a defence to a charge under s.1(2) and the jury convicted the respondent. The Court of Appeal held that the direction to the jury was wrong and set aside the conviction under s.1(2). On an appeal to the House of Lords by the Crown,

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Held (Lord Wilberforce and Lord Edmund-Davies dissenting): if the charge of an offence under s.1(2) of the Act was framed so as to charge the defendant only with "intending by the destruction or damage of the property to endanger the life of another," evidence of self-induced intoxication could be relevant to his defence, but if the charge was or included a reference to his "being reckless as to whether the life of another would thereby be endangered" evidence of self-induced intoxication was not relevant.

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Appeal by the Crown against a decision of the Court of Appeal quashing the conviction of the respondent, James Caldwell, of an offence under s.1(2) of the Criminal Damage Act, 1971.

iv

N Denison QC and K Blundell-Jones for the Crown.
M Thomas QC and D Thomas for the respondent.

19th March, 1981. The following opinions were delivered.

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Lord Wilberforce

LORD WILBERFORCE: My Lords, I would dismiss the appeal and answer the certified questions as suggested by my noble and learned friend Lord Edmund-Davies.

LORD DIPLOCK: The facts that gave rise to this appeal are simple. The respondent had been doing work for the proprietor of a residential hotel. He considered that he had a grievance against the proprietor. One night he got very drunk and in the early hours of the morning he decided to revenge himself on the proprietor by setting fire to the hotel, in which some ten guests were living at the time. He broke a window and succeeded in starting a fire in a ground room floor but fortunately it was discovered and the flames were extinguished before any serious damage was caused. At his trial he said the he was so drunk at the time that the thought that there might be people in the hotel whose lives might be endangered if it were set on fire had never

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crossed his mind.

He was indicted at the Central Criminal Court on two counts of arson under s.1(1) and (2) respectively of the Criminal Damage Act, 1971. That section reads as follows:

'(1) A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.

'(2) A person who without lawful excuse destroys or damages any property, whether belonging to himself or another – (a) intending to destroy or damage any property or being reckless as to whether any property would be destroyed or damaged; and (b) intending by the destruction or damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered; shall be guilty of an offence.

'(3) An offence committed under this section by destroying or damaging property by fire shall be charged as arson.'

Count 1 contained the charge of the more serious offence under s.1 (2) which requires intent to endanger the life of another or recklessness whether the life of another would be endangered. To this count the respondent pleaded not guilty. He relied on his self-induced drunkenness as a defence on the ground that the offence under sub-s.(2) was one of 'specific intent' in the sense in which that expression was used in speeches in this House in *Director of Public Prosecutions v. Majewski* (1). Count 2 contained the lesser offence under s.1(1) to which the respondent pleaded guilty. The recorder directed the jury that self-induced drunkenness was not a defence to count 1, and the jury convicted him on this count. The recorder sentenced him to three years' imprisonment on count 1 but passed no sentence on count 2, the lesser offence, to which he had pleaded guilty. On appeal the Court of Appeal held that her direction to the jury as to the effect of self-induced drunkenness on the charge in count 1 was wrong. They set aside the conviction on that count but left the sentence of three years' imprisonment uncharged as they considered it to be an appropriate sentence on count 2. So it was only a Pyrrhic victory for the respondent, but it left the law on criminal damage and drunkenness in a state of some confusion.

The question of law certified for the opinion of this House was:

'Whether evidence of self-induced intoxication can be relevant to the following questions – (a) Whether the defendant intended to endanger the life of another; and (b) Whether the defendant was reckless as to whether the life of another would be endangered, within the meaning of s.1(2)(b) of the Criminal Damage Act 1971.'

The question recognises that under s.1(2)(b) there are two alternative

(1) 140 J.P. 315; [1977] AC 443

states of mind as respects endangering the life of another, and that the existence of either of them on the part of the accused is sufficient to constitute the mens rea needed to convert the lesser offence under s.1(1) into the graver offence under s.1(2). One is intention that a particular thing should happen in consequence of the actus reus, viz that the life of another should be endangered (this was not relied on by the Crown in the instant case). The other was recklessness whether that particular thing should happen or not. The same dichotomy of mens rea intention and recklessness, is to be found throughout the section: in sub-s.(1) and para.(a) of sub-s.(2) as well as in para.(b); and 'reckless' as descriptive of a state of mind must be given the same meaning in each of them.

The Criminal Damage Act, 1971, replaced almost in their entirety the many and detailed provisions of the Malicious Damage Act 1861. Its purpose, as stated in its long title was to *revise* the law of England and Wales as to offences of damage to property. As the brevity of the Act suggests, it must have been hoped that it would also simplify the law. In the 1861 Act, the word consistently used to describe the mens rea that was a necessary element in the multifarious offences that the Act created was 'maliciously', a technical expression, not readily intelligible to juries, which became the subject of considerable judicial exegesis. This culminated in a judgment of the Court of Criminal Appeal in *R. v. Cunningham* (2) which approved, as an accurate statement of the law, what had been said by Professor Kenny in his *Outlines of Criminal Law* (1st edn, 1902):

'in any statutory definition of a crime "malice" must be taken . . . as requiring either (i) an actual intention to do the particular kind of harm that in fact was done, or (ii) recklessness as to whether such harm should occur or not (i.e. the accused has foreseen that the particular kind of harm might be done, and yet has gone on to take the risk of it) . . .'

In this passage Professor Kenny was engaged in defining for the benefit of students the meaning of 'malice' as a term of art in criminal law. To do so he used ordinary English words in their popular meaning. Among the words he used was 'recklessness', the noun derived from the adjective 'reckless', of which the popular or dictionary meaning is 'careless, regardless, or heedless of the possible harmful consequences of one's acts'. It presupposes that, if thought were given to the matter by the doer before the act was done, it would have been apparent to him that there was a real risk of its having the relevant harmful consequences; but, granted this, recklessness covers a whole range of states of mind from failing to give any thought at all to whether or not there is any risk of those harmful consequences, to recognising the existence of the risk and nevertheless deciding to ignore it. Conscious of this imprecision in the popular meaning of recklessness as descriptive of a state of mind, Professor Kenny, in the passage quoted, was, as it seems to me, at pains to indicate by the words in brackets the particular species within the genus, reckless states of mind, that constituted

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'malice' in criminal law. This parenthetical restriction on the natural meaning of recklessness was necessary to an explanation of the meaning of the adverb 'maliciously' when used as a term of art in the description of an offence under the Malicious Damage Act, 1861 (which was the matter in point in *R. v. Cunningham*)⁽²⁾ but it was not directed to and consequently has no bearing on the meaning of the adjective 'reckless' in s.1 of the Criminal Damage Act 1971. To use it for that purpose can, in my view, only be misleading.

The restricted meaning that the Court of Appeal in *R. v. Cunningham* (2) had placed on the adverb 'maliciously' in the Malicious Damage Act 1861 in cases where the prosecution did not rely on an actual intention of the accused to cause the damage that was in fact done called for a meticulous analysis by the jury of the thoughts that passed through the mind of the accused at or before the time he did the act that caused the damage, in order to see on which side of a narrow dividing line they fell. If it had crossed his mind that there was a risk that someone's property might be damaged but, because his mind was affected by rage or excitement or confused by drink, he did not appreciate the seriousness of the risk or trusted that good luck would prevent its happening, this state of mind would amount to malice in the restricted meaning placed on that term by the Court of Appeal, whereas if, for any of these reasons, he did not even trouble to give his mind to the question whether there was any risk of damaging the property, this state of mind would not suffice to make him guilty of an offence under the Malicious Damage Act 1861.

Neither state of mind seems to me to be less blameworthy than the other, but, if the difference between the two constituted the distinction between what does and what does not in legal theory amount to a guilty state of mind for the purposes of a statutory offence of damage to property, it would not be a practicable distinction for use in a trial by jury. The only person who knows what the accused's mental processes were is the accused himself, and probably not even he can recall them accurately when the rage or excitement under which he acted has passed, or he has sobered up if he were under the influence of drink at the relevant time. If the accused gives evidence that because of his rage, excitement or drunkenness the risk of particular harmful consequences of his acts simply did not occur to him, a jury would find it hard to be satisfied beyond reasonable doubt that his true mental process was not that, but was the slightly different mental process required if one applies the restricted meaning of 'being reckless as to whether' something would happen, adopted by the Court of Appeal in *R. v. Cunningham* (2).

I can see no reason why Parliament, when it decided to revise the law as to offences of damage to property, should go out of its way to perpetuate fine and impracticable distinctions such as these, between one mental state and another. One would think that the sooner they were got rid of the better. When cases under s.1(1) of the new Act, in which the Crown's case was based on the accused having been 'reckless as to whether . . . property would be destroyed or damaged',

first came before the Court of Appeal, the question as to the meaning of the expression 'reckless' in the context of that subsection appears to have been treated as soluble simply by posing and answering what had by then, unfortunately, become an obsessive question among English lawyers: Is the test of recklessness subjective or objective? The first two reported cases, in both of which judgments were given off the cuff, are *R. v. Briggs* (3) and *R. v. Parker* (4). Both classified the test of recklessness as subjective. This led the court in *R. v. Briggs* to say:

‘A man is reckless in the sense required when he carries out a deliberate act knowing that there is some risk of damage resulting from that act but nevertheless continues in the performance of that act.’

This leaves over the question whether the risk of damage may not be so slight that even the most prudent of men would feel justified in taking it, but it excludes that kind of recklessness that consists of acting without giving any thought at all to whether or not there is any risk of harmful consequences of one's act, even though the risk is great and would be obvious if any thought were given to the matter by the doer of the act. *R. v. Parker* (4), however, opened the door a chink by adding as an alternative to the actual knowledge of the accused that there is some risk of damage resulting from his act and his going to take it, a mental state described as ‘closing his mind to the obvious fact’ that there is such a risk.

R. v. Stephenson (5), the first case in which there was full argument, though only on one side, and a reserved judgment, slammed the door again on any less restricted interpretation of 'reckless' whether particular consequences will occur than that originally approved in *Briggs* (3). The appellant, a tramp, intending to pass the night in a hollow in the side of a haystack, had lit a fire to keep himself warm; as a result of this the stack itself caught fire. At his trial, he was not himself called as a witness but a psychiatrist gave evidence on his behalf that he was schizophrenic and might not have had the same ability to foresee or appreciate risk as a mentally normal person. The judge had given to the jury the direction on the meaning of reckless that had been approved in *R. v. Parker* (4). The argument for the appellant on the appeal was that this let in an objective test whereas the test should be entirely subjective. It was buttressed by copious citation from previous judgments in civil and criminal cases where the expressions 'reckless' or 'recklessness' had been used by judges in various contexts. Counsel for the Crown expressed his agreement with the submissions for the appellant. The judgment of the court contains an analysis of a number of the cited cases, mainly in the field of civil law. These cases do not disclose a uniform judicial use of the terms; and as respects judicial statements made before the current vogue for classifying all tests of legal liability as either objective or subjective they are not easily assignable to one of those categories rather than the other. The court, how-

(3) [1977] 1 WLR 605

(4) [1977] 1 WLR 600

(5) 143 JP 592; [1979] 3 WLR 193

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ever, reached its final conclusion by a different route. It made the assumption that although Parliament in replacing the 1861 Act by the 1971 Act had discarded the word 'maliciously' as descriptive of the mens rea of the offences of which the actus reus is damaging property in favour of the more explicit phrase 'intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed', it nevertheless intended the words to be interpreted in precisely the same sense as that in which the single adverb 'maliciously' had been construed by Professor Kenny in the passage that received the subsequent approval of the Court of Appeal in *R. v. Cunningham* (2).

I see no warrant for making any such assumption in an Act the declared purpose of which is to revise the then existing law as to offences of damage to property, not to perpetuate it. 'Reckless' as used in the new statutory definition of the mens rea of these offences is an ordinary English word. It had not by 1971 become a term of legal art with some more limited esoteric meaning than that which it bore in ordinary speech, a meaning which surely includes not only deciding to ignore a risk of harmful consequences resulting from one's acts that one has recognised as existing, but also failing to give any thought to whether or not there is any such risk in circumstances where, if any thought were given to the matter, it would be obvious that there was. If one is attaching labels, the latter state of mind is neither more nor less 'subjective' than the first. But the label solves nothing. It is a statement of the obvious; mens rea is, by definition, a state of mind of the accused himself at the time he did the physical act that constitutes the actus reus of the offence; it cannot be the mental state of some non-existent, hypothetical person.

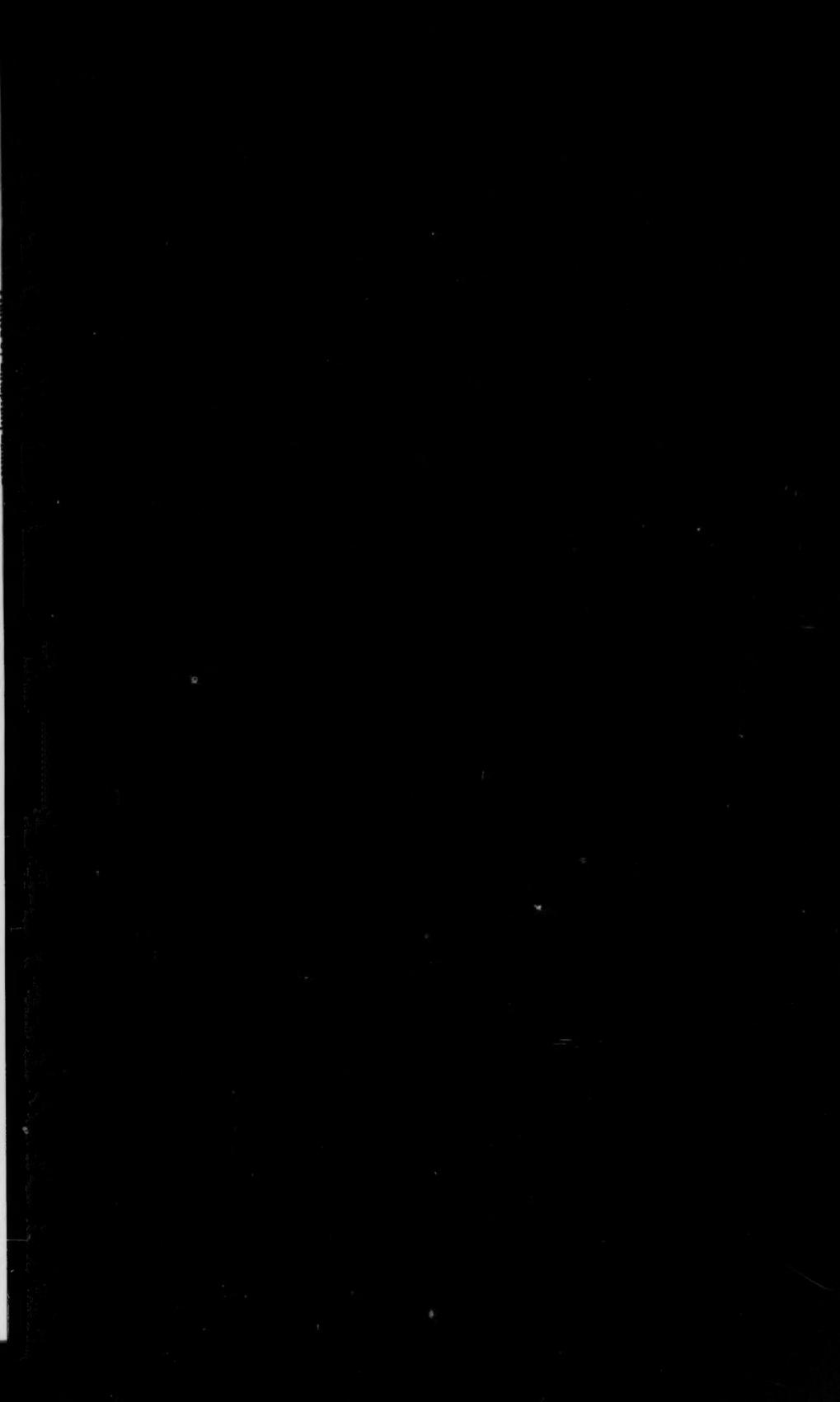
Nevertheless, to decide whether someone has been 'reckless' whether harmful consequences of a particular kind will result from his act, as distinguished from his actually intending such harmful consequences to follow, does call for some consideration of how the mind of the ordinary prudent individual would have reacted to a similar situation. If there were nothing in the circumstances that ought to have drawn the attention of an ordinary prudent individual to the possibility of that kind of harmful consequence, the accused would not be described as 'reckless' in the natural meaning of that word for failing to address his mind to the possibility; nor, if the risk of the harmful consequences was so slight that the ordinary prudent individual on due consideration of the risk would not be deterred from treating it as negligible, could the accused be described as 'reckless' in its ordinary sense if, having considered the risk, he decided to ignore it. (In this connection the gravity of the possible harmful consequences would be an important factor. To endanger life must be one of the most grave.) So to this extent, even if one ascribes to 'reckless' only the restricted meaning, adopted by the Court of Appeal in *Stephenson* (5) and *Briggs*, (3)

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(2) 121 JP 451; [1957] 2 QB 396

(3) [1977] 1 WLR 605

(5) 143 JP 592; [1979] 3 WLR 193





of foreseeing that a particular kind of harm might happen and yet going on to take the risk of it, it involves a test that would be described in part as 'objective' in current legal jargon. Questions of criminal liability are seldom solved by simply asking whether the test is subjective or objective.

In my opinion, a person charged with an offence under s.1(1) of the 1971 Act is 'reckless as to whether or not any property would be destroyed or damaged' if (i) he does an act which in fact creates an obvious risk that property will be destroyed or damaged, and (ii) when he does the act he either has not given any thought to the possibility of there being any such risk or has recognised that some risk was involved and has none the less gone on to do it. That would be a proper direction to the jury; cases in the Court of Appeal which held otherwise should be regarded as overruled. Where the charge is under s.1(2) the question of the state of mind of the accused must be approached in stages, corresponding to paras (a) and (b). The jury must be satisfied that what the accused did amounted to an offence under s.1(1), either because he actually intended to destroy or damage the property or because he was reckless (in the sense that I have described) whether it might be destroyed or damaged. Only if they are so satisfied must the jury go on to consider whether the accused also either actually intended that the destruction or damage of the property should endanger someone's life or was reckless (in a similar sense) whether a human life might be endangered.

Turning now to the instant case, the first stage was eliminated by the respondent's plea of guilty to the charge under s.1(1). Furthermore he himself gave evidence that his actual intention was to damage the hotel in order to revenge himself on the proprietor. As respects the charge under s.1(2) the prosecution did not rely on an actual intent of the respondent to endanger the lives of the residents but relied on his having been reckless whether the lives of any of them would be endangered. His act of setting fire to it was one which the jury were entitled to think created an obvious risk that the lives of the residents would be endangered; and the only defence with which your Lordships are concerned is that the respondent had made himself so drunk as to render him oblivious of that risk. If the only mental state capable of constituting the necessary mens rea for an offence under s.1(2) were that expressed in the words 'intending by the destruction or damage to endanger the life of another', it would have been necessary to consider whether the offence was to be classified as one of 'specific' intent for the purposes of the rule of law which this house affirmed and applied in *Director of Public Prosecutions v. Majewski* (1) and this it plainly is. But this is not, in my view, a relevant inquiry where 'being reckless as to whether the life of another would be thereby endangered' is an alternative mental state that is capable of constituting the necessary mens rea of the offence with which he is charged.

The speech of Lord Elwyn-Jones, L.C., in *Majewski* (1) with which Lord Simon, Lord Kilbrandon and I agreed, is authority that self-induced intoxication is no defence to a crime in which recklessness is

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enough to constitute the necessary mens rea. The charge in *Majewski* was of assault occasioning actual bodily harm and it was held by the majority of the House, approving *R. v. Venna* (6), that recklessness in the use of force was sufficient to satisfy the mental element in the offence of assault. Reducing oneself by drink or drugs to a condition in which the restraints of reason and conscience are cast off was held to be a reckless course of conduct and an integral part of the crime. Lord Elwyn-Jones, L.C., accepted as correctly stating English law the provision in para. 2.08(2) of the American Model Penal Code:

'When recklessness establishes an element of the offence, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.'

So, in the instant case, the fact that the respondent was unaware of the risk of endangering the lives of residents in the hotel owing to his self-induced intoxication would be no defence if that risk would have been obvious to him had he been sober.

The Court of Appeal in the instant case regarded the case as turning on whether the offence under s. 1(2) was one of 'specific' intent or 'basic' intent. Following a recent decision of the Court of Appeal by which it was bound, *R. v. Orpin* (7), it held that the offence under s. 1(2) was one of specific intent in contrast to the offence under s. 1(1) which was of basic intent. This would be right if the only mens rea capable of constituting the offence were an actual intention to endanger the life of another. For the reasons I have given, however, classification into offences of specific and basic intent is irrelevant where being reckless whether a particular harmful consequence will result from one's act is a sufficient alternative mens rea. The recorder's summing-up was not a model of clarity. Contrary to the view of the Court of Appeal she was right in telling the jury that in deciding whether the respondent was reckless whether the lives of residents in the hotel would be endangered, the fact that, because of his drunkenness, he failed to give any thought to that risk was irrelevant, but there were other criticisms of the summing-up made by the Court of Appeal which your Lordships very properly have not been invited to consider, since it makes no practical difference to the respondent whether the appeal is allowed or not. Since it is not worth while spending time on going into these criticisms, I would dismiss the appeal.

I would give the following answers to the certified questions: (a) if the charge of an offence under s. 1(2) of the Criminal Damage Act 1971 is framed so as to charge the defendant only with 'intending by the destruction or damage [of the property] to endanger the life of another', evidence of self-induced intoxication can be relevant to his defence; (b) if the charge is, or includes, a reference to his 'being reckless as to whether the life of another would thereby be endangered', evidence of self-induced intoxication is not relevant.

(6) 140 JP 31; [1975] 3 WLR 737

(7) [1980] 1 WLR 1050

LORD EDMUND-DAVIES: I respectfully concur in holding that this appeal must be dismissed. I nevertheless consider that one of the certified questions should be answered in a manner contrary to that favoured by a majority of your Lordships. And I believe that the reason for my arriving at a different conclusion is of some importance and that it should be explored.

We are concerned with a charge of arson in contravention of s.1(2) of the Criminal Damage Act 1971, which needs to be seen in its statutory setting. Section 1 is in the following terms:

'(1) A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.

'(2) A person who without lawful excuse destroys or damages any property, whether belonging to himself or another — (a) intending to destroy or damage any property or being reckless as to whether any property would be destroyed or damaged; and (b) intending by the destruction or damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered; shall be guilty of an offence.

'(3) An offence committed under this section by destroying or damaging property by fire shall be charged as arson.'

In considering the section, there are two matters of particular importance. (1) What constitutes 'recklessness' in the criminal law? (2) What is the mens rea of the offence commonly (and understandably) known as 'aggravated arson' in s.1(2)(b)? I turn to these questions forthwith.

(1) Recklessness

The words 'intention' and 'recklessness' have increasingly displaced in statutory crimes the word 'maliciously', which has frequently given rise to difficulty in interpretation. In *R. v. Cunningham* (2), Byrne, J, in the Court of Criminal Appeal cited with approval the following passage which has appeared in Kenny's Outline of Criminal Law from its first edition in 1902 onwards:

'in any statutory definition of a crime "malice" must be taken not in the old vague sense of "wickedness" in general, but as requiring either (i) an actual intention to do the particular kind of harm that in fact was done, or (ii) recklessness as to whether such harm should occur or not (i.e. the accused has foreseen that the particular kind of harm might be done, and yet has gone on to take the risk of it). It is neither limited to, nor does it indeed require, any ill-will towards the person injured.'

Byrne J's comment was laconic and unqualified: 'We think that this is an accurate statement of the law . . . In our opinion, the word "maliciously" in a statutory crime postulates foresight of consequence.' My Lords, my noble and learned friend Lord Diplock somewhat dis-

(2) 121JP 451; [1957] 2 QB 396

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missively describes Professor Kenny as having been 'engaged in defining for the benefit of students the meaning of "malice" as a term of art in criminal law,' adding:

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'To do so he used ordinary English words in their *popular* meaning. Among the words he used was "recklessness", the noun derived from the adjective "reckless", of which the popular or dictionary meaning is "careless, regardless, or heedless of the possible harmful consequences of one's acts". It presupposes that, if thought were given to the matter by the doer before the act was done, *it would have been apparent to him* that there was a real risk of its having the relevant harmful consequences ... This parenthetical restriction on the natural meaning of recklessness was necessary to an explanation of the meaning of the adverb "maliciously" when used as a term of art in the description of an offence under the Malicious Damage Act 1861 (which was the matter in point in *R. v. Cunningham*) (2) but it was not directed to and consequently has no bearing on the meaning of the adjective "reckless" in s.1 of the Criminal Damage Act 1971.' (Emphasis added).

I have to say that I am in respectful, but profound, disagreement. The law in action compiles its own dictionary. In time, what was originally the common coinage of speech acquires a different value in the pocket of the lawyer than when in the layman's purse. Professor Kenny used lawyers' words in a lawyer's sense to express his distillation of an important part of the established law relating to mens rea, and he did so in a manner accurate not only in respect of the law as it stood in 1902 but also as it has been applied in countless cases ever since, both in the United Kingdom and in other countries where the common law prevails: see, for example, in Western Australia, *Lederer v. Hitchins* (8), and, in the United States of America, Jethro Brown's General Principles of Criminal Law (2nd edn, p.115). And it is well known that the 1971 Act was in the main the work of the Law Commission, who defined recklessness by saying:

'A person is reckless if, (a) knowing that there is a risk that an event may result from his conduct or that a circumstance may exist, he takes that risk, and (b) it is unreasonable for him to take it, having regard to the degree and nature of the risk which he knows to be present.'

(see Working Paper no.31, Codification of the Criminal Law: General Principles: The Mental Element in Crime (16th June 1970)). It was surely with this contemporaneous definition and the much respected decision of *R. v. Cunningham* (2) in mind that the draftsman proceeded to his task of drafting the 1971 Act. It has therefore to be said that, unlike negligence, which has to be judged objectively, recklessness involves foresight of consequences, combined with an objective judg-

(2) 121 JP 451; [1957] 2 QB 396

(8) 1961 WAR 99

ment of the reasonableness of the risk taken. And recklessness in vacuo is an incomprehensible notion. It *must* relate to foresight of risk of the particular kind relevant to the charge preferred, which, for the purpose of s.1(2), is the risk of endangering life and nothing other than that. So, if a defendant says of a particular risk: 'It never crossed my mind', a jury could not on those words alone properly convict him of recklessness simply because they considered that the risk *ought* to have crossed his mind, though his words might well lead to a finding of negligence. But a defendant's admission that he 'closed his mind' to a particular risk could prove fatal, for

'A person cannot, in any intelligible meaning of the words, close his mind to a risk unless he first realises that there is a risk; and if he realises that there is a risk, that is the end of the matter'.

(see Glanville Williams, Textbook of Criminal Law (1st edn, 1978, p.79)).

In the absence of exculpatory factors, the defendant's state of mind is therefore all-important where recklessness is an element in the offence charged, and s.8 of the Criminal Justice Act 1967 has laid down that:

'A court or jury, in determining whether a person has committed an offence, — (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.' (Emphasis added.)

My Lords, it is unnecessary to examine at length the proposition that ascertainment of the state of mind known as 'recklessness' is a subjective exercise, for the task was expansively performed by Geoffrey Lane, L.J., in *R. v. Stephenson* (5). And, indeed, that was the view expressed by the learned recorder herself in the instant case when, citing *R. v. Briggs* (3), she directed the jury at one stage in these terms:

'It may be the most useful function that I can perform if I read to you the most recent (I hope) definition of 'recklessness' . . . by a superior court . . . A man is reckless . . . when he carries out a deliberate act, knowing that there is some risk of damage resulting from that act, but "nevertheless continues in the performance of that act . . ." That came, in fact, in a case of a straight arson and damage to property, but in this case you would probably feel that you had to add after the words to fit this section of the Act "some risk of damage to life" . . . because that is what we are concerned with. I see both counsel nod assent to that. So, we can stay on common ground.'

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(3) [1977] 1 WLR 605
(5) 143 JP 592; [1979] 3 WLR 193

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(2) The 'mens rea' of aggravated arson.

The first count charged the respondent with 'Arson contrary to s.1(2) and (3) of the Criminal Damage Act 1971', and the particulars of the offence were in the following terms:

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'James Caldwell on the 23rd day of December 1978 without lawful excuse you damaged by fire a window frame and curtains at the Hydro Hotel . . . belonging to another intending to damage the said property or being reckless as to whether any such property would be damaged *and* intending by the said damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered.' (Emphasis added.)

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My Lords, the very layout of s.1 makes clear that a state of mind over and beyond that essential for a conviction under s.1(1) has to be established before the graver crime created by s.1(2) can be brought home. The latter has features both of an offence against property *and* an offence against the person, and a special 'intent' or a special 'recklessness' is involved, a state of mind 'ulterior' to the 'basic' intent or recklessness which is sufficient for s.1(1). And 'intention' and 'recklessness' are more than birds of a feather; they are blood-brothers; so much so that Austin included 'recklessness' within the term 'intention' (see *Jurisprudence* (4th edn, vol. 1, pp.436, 441, 442)). As James, L.J., said in *R. v. Venna* (6): 'In many cases the dividing line between intention and recklessness is barely distinguishable.' So in *R. v. O'Driscoll* (9), where the charge was one of manslaughter caused by setting fire to a house, Waller, L.J., giving the judgment of the Court of Appeal, Criminal Division, said:

'We are of the opinion in this case that the unlawful act relied on by the learned judge of damaging the building of another by fire involved a basic intent . . . It would have been different in our view if the intent had involved the question of danger to the life of others, as in subs.(2) of s.1 of the Criminal Damage Act 1971, because that would not be inherent in the *actus reus* if there was an intention to endanger the life of another or recklessness as to whether the life of another would be endangered or not. As I have already stated, in our view this was a crime of basic intent . . . and therefore the defence of drunkenness does not avail at all: see *D.P.P. v. Majewski* (1).' (1)

And in *R. v. Stephenson* (5), where the charge was laid under s.1(1), Geoffrey Lane, L.J., said:

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(1) 140 J.P. 315; [1977] AC 443

(5) 149 J.P. 592; [1979] 3 WLR 193

(6) 140 J.P. 31; [1975] 3 WLR 737

(9) (1977) 65 Cr. App. R. 50

"There is no doubt that the subjective definition of "recklessness" does produce difficulties. One of them, which is particularly likely to occur in practice, is the case of the person who by self-induced intoxication by drink or drugs deprives himself of the ability to foresee the risks involved in his actions. Assuming that by reason of his intoxication he is not proved to have foreseen the relevant risk, can he be said to have been "reckless"? Plainly not, unless cases of self-induced intoxication are an exception to the general rule. In our judgment the decision of the House of Lords in *Director of Public Prosecutions v. Majewski* (1) makes it clear that they are such an exception. Evidence of self-induced intoxication such as to negative mens rea is a defence to a charge which required proof of a "specific intent", but not to a charge of any other crime. The Criminal Damage Act 1971, s.1(1), involves no specific intent: see *R. v. O'Driscoll*. Accordingly, it is no defence under the 1971 Act for a person to say that he was deprived by self-induced intoxication of the ability to foresee or appreciate an obvious risk.'

That Geoffrey Lane, LJ, was referring in his final sentence only to s.1(1) of the Act is made clear by its context, and in *R. v. Orpin* (7) Evelleigh, LJ, said:

"The mental element, intention or recklessness, in the second part of sub-s.(2) is an aggravating circumstance which adds to the gravity of the actus reus which is defined in the first part of that subsection. Although the proof of that additional element will often involve evidence as to possible or actual danger of life, *the additional aggravating factor lies in the mind*. It is the mental attitude to the consequences of an actus reus. It goes beyond the actus reus itself, and is therefore to be treated as a specific intent which has to be established as an ingredient of the offence. That being so, evidence of intoxication is relevant as one of those matters to be taken into consideration in determining whether or not the necessary mental element existed. There is nothing inconsistent in treating an offence under sub-s.(1) as a crime of basic intent and an offence under sub-s.(2) as one of specific intent. It is only the second part of sub-s.(2) which introduces a specific intent. The same words are used to denote the attitude of mind, but in the one case there is an act stipulated corresponding to the mental state and manifesting its existence, whilst in the other there is no such act.' (Emphasis added.)

But the trial judge here unfortunately failed to differentiate between the different types of arson embraced by s.1 of 1971 Act by directing the jury without qualification that 'arson is an offence of basic intent'. This led her, in purported pursuance of *Majewski* (1), to conclude that

(1) 140 JP 315; [1977] AC 448

(7) [1980] 1 WLR 1050

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'it is no defence for the accused, by reason of self-induced intoxication, to say that he was senseless and so had neither "intent" nor "recklessness" with regard to what he was doing . . . One basic, simple act of setting fire to the curtains, with a view to igniting the building, is what is relied on for the commission of the building, is what is relied on for the commission of the offence . . . if a person . . . sets out with intent to set fire to something, that is a positive, basic act, and he has with him the equipment to do it, he cannot then be allowed to say, "Well, yes, I meant to set fire to *that*, but that's all."'

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In my judgment, the Court of Appeal, Criminal Division, was right in holding that this direction contained two errors. In the first place, despite her earlier, correct direction as to the subjective nature of the 'recklessness' test, the recorder invited the jury to hold recklessness established if they considered that it was

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'. . . a fair likelihood that . . . if the wind was in the right direction, perhaps, to fan the flames rather than peter them out, it might have got a good hold of the furniture in the room . . . '

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That was undoubtedly a direction that the 'recklessness' of the accused's action was to be judged objectively. And the second error lay in directing the jury without qualification that (a) all arson is an offence of basic intent and, consequently, that (b) since *Majewski* (1) it matters not if, by reason of the defendant's self-intoxication, he may not have the possibility that his admittedly unlawful actions endangered life.

Something more must be said about (b) having regard to the view expressed by my noble and learned friend Lord Diplock that the speech of Lord Elwyn-Jones, LC in *Majewski* (1)

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'is authority that self-induced intoxication is no defence to a crime in which recklessness is enough to constitute the necessary mens rea'.

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It is a view which, with respect, I do not share. In common with all the Law Lords hearing that appeal, Lord Elwyn-Jones LC adopted the well-established (though not universally favoured) distinction between basic and specific intents. *Majewski* (1) related solely to charges of assault, undoubtedly an offence of basic intent, and Lord Elwyn-Jones made it clear that his observations were confined to offences of that nature (see [1977] AC 443 at 473, 474, 475, 476). My respectful view is that *Majewski* (1) accordingly supplies no support for the proposition that, in relation to crimes of specific intent (such as that in s.1(2)(b) of the 1971 Act), incapacity to appreciate the degree and nature of the risk created by his action which is attributable to the defendant's self-intoxication is an irrelevance. Lord Elwyn-Jones was dealing simply with crimes of basic intent, and in my judgment it

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was strictly within that framework that he adopted the view expressed in the American Penal Code, and recklessness as an element in crimes of specific intent was, I am convinced, never within his contemplation.

For the foregoing reasons, the Court of Appeal was in my judgment right in quashing the conviction under s.1(2)(b) and substituting a finding of guilty of arson contrary to s.1(1) and (3) of the 1971 Act. It follows, therefore, that I agree with learned counsel for the respondent that the certified point of law should be answered in the following manner: 'Yes, evidence of self-induced intoxication can be relevant both to (a) whether the defendant intended to endanger the life of another, and to (b) whether the defendant was reckless as to whether the life of another would be endangered, within the meaning of s.1(2)(b) of the Criminal Damage Act, 1971.'

It was recently predicted that 'There can hardly be any doubt that all crimes of recklessness except murder will now be held to be crimes of basic intent within Majewski' (1) (see Glanville Williams, Textbook of Criminal Law (p.431)). That prophecy has been promptly fulfilled by the majority of your Lordships, for, with the progressive displacement of 'maliciously' by 'intentionally or recklessly' in statutory crimes, that will surely be the effect of the majority decision in this appeal. That I regret, for the consequence is that, however grave the crime charged, if recklessness can constitute its mens rea the fact that it was committed in drink can afford no defence. It is a very long time since we had so harsh a law in this country. Having revealed in Majewski (1) my personal conviction that, on grounds of public policy, a plea of drunkenness cannot exculpate crimes of basic intent and so exercise unlimited sway in the criminal law, I am nevertheless unable to concur that your Lordships' decision should now become the law of the land. For, as Eveleigh LJ said in *R. v. Orpin* (7):

'There is nothing inconsistent in treating intoxication as irrelevant when considering the liability of a person who has willed himself to do that which the law forbids (for example to do something which wounds another), and yet to make it relevant when a further mental state is postulated as an aggravating circumstance making the offence even more serious.'

By way of a postscript I would add that the majority view demonstrates yet again the folly of totally ignoring the recommendations of the Butler Committee (Report on Mentally Abnormal Offenders (Cmnd 6244 (1975)), paras 18, 53-58). I would dismiss the appeal.

LORD KEITH OF KINKEL: I am in entire agreement with the reasoning contained in the speech of my noble and learned friend

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(1) 140 JP 315; [1977] AC 443

(7) [1980] 1 WLR 1050

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Lord Diplock, which I have had the benefit of reading in draft. I would answer the certified questions in the manner which he proposes, and dismiss the appeal.

LORD ROSKILL: I had prepared an opinion of my own in this appeal but having had the advantage of reading in draft the speech of my noble and learned friend Lord Diplock I am satisfied that no useful purpose would be served by delivering that speech. I agree in every respect with what my noble and learned friend has said in his speech and with his proposed answers to the questions certified. For the reasons he gives I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *R.E.T. Birch; Gordon & James Morton.*

Reported by G. F. L. Bridgman, Esq., Barrister.

HOUSE OF LORDS

(Lord Hailsham of St Marylebone, L.C., Lord Diplock, Lord Fraser
of Tullybelton, Lord Roskill, and Lord Bridge of Harwich.)
March 19, 1981

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R. v. LAWRENCE

*Road Traffic — Causing death by reckless driving — "Reckless" —
Direction to jury — Road Traffic Act, 1972, as substituted by
s.50(1) of the Criminal Law Act, 1977.*

On April 13, 1979, after night had fallen, the respondent was riding his motor cycle along an urban street when he ran into and killed a pedestrian who was crossing the road. On March 18, 1980, he was convicted in the Crown Court of causing death by reckless driving contrary to s.1 of the Road Traffic Act, 1972, as substituted by the Criminal Law Act, 1977, s.50(1). On May 20, 1980, the Court of Appeal quashed his conviction. The prosecution appealed to the House of Lords.

Held (dismissing the appeal): an appropriate instruction to the jury on what was meant by driving recklessly would be that they must be satisfied of two things: first that the driver was driving the vehicle in such a manner as to create an obvious and serious risk of causing physical injury to another person who might happen to be using the road, or of doing substantial damage to property, and, secondly, that in driving in that manner he did so without giving any thought of the possibility of there being any such risk, or, having recognized that there was some risk involved, had none the less gone on to take it; it was for the jury to decide whether the risk created by the manner in which the vehicle was driven was both obvious and serious, and, in deciding this they might apply the standard of the ordinary prudent motorist as represented by themselves; if satisfied that an obvious and serious risk was created by the manner of the defendant's driving the jury were entitled to infer that he was in one or other of the states of mind required to constitute the offence, and would probably do so, but regard must be given to any explanation he gave as to his state of mind which might displace the inference.

R. v. Murphy (1980) 144 J.P. 360 overruled.

Observations regarding "the tortoise pace at which cases in the Crown Court are nowadays so frequently allowed to amble on."

Appeal by the prosecution against a decision of the Court of Appeal quashing the conviction at Ipswich Crown Court of Stephen Richard Lawrence on a charge of causing death by dangerous driving contrary to s.1 of the Road Traffic Act, 1972, as substituted by s.50(1) of the Criminal Law Act 1977.

D H Penry-Davey for the Crown.
A Arlidge for the respondent.

Their Lordships took time for consideration.

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19th March, 1981. The following opinions were delivered.

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LORD HAILSHAM OF ST MARYLEBONE, L.C.: The question in this appeal is whether the conviction on 18th March, 1980, of the respondent for causing death by reckless driving should be restored. In my opinion it should not, both on the grounds on which it was quashed by the Court of Appeal, and on the more general ground about to be formulated by my noble and learned friend Lord Diplock, with whose conclusions and reasoning I wish to be wholly and unequivocally associated. If I proceed with a few observations of my own about the course of the proceedings, it is because I wish to draw some lessons from them regarding the general conduct of trials on indictment, and not because I wish to repeat in other words what my noble and learned friend is about to say. It is notorious that there has grown up a serious backlog of cases for trial in the Crown Court, and this is particularly the case in the South East and London. This backlog has been a source of particular anxiety to me in both my terms of office, as I know it is currently to the present Lord Chief Justice. The causes of it are complex, and the remedies are therefore not particularly simple. But, so long as it persists, the whole system of trial by jury, and the regard in which it is rightly held, are adversely affected.

It is a truism to say that justice delayed is justice denied. But it is not merely the anxiety and uncertainty in the life of the accused, whether on bail or remand, which are affected. Where there is delay the whole quality of justice deteriorates. Our system depends on the recollection of witnesses, conveyed to a jury by oral testimony. As the months pass, this recollection necessarily dims and juries who are correctly directed not to convict unless they are assured of the reliability of the evidence for the prosecution necessarily tend to acquit as this becomes less precise, and sometimes less reliable. This may also affect defence witnesses on the opposite side. In the instant case, an accident took place unexpectedly in a matter of seconds. The evidence at the trial included the testimony of witnesses, present on the occasion, none of whom could have been expecting a moment before it occurred that they were to be confronted with a desperate tragedy, to the sequence of events in which in 11 months' time they would be expected to testify on oath.

Part of the delay in bringing cases to trial is due to the increase in the volume of indictable crime brought to the Crown Court. But part also is due to the increasing prolixity in the conduct of cases when they actually come to be heard. It cannot be too often stressed that verbose justice is not necessarily good justice. There is virtue, both from the point of view of the prosecution and from the point of view of the defence, in incisiveness, decisiveness and conciseness, not only in addressing juries but in the general conduct of a case, the examination and cross-examination of witnesses, the submission of legal argument, and in summing-up. A long trial is not necessarily a better one if a shorter one would have sufficed. It is these considerations which lead me to analyse the course of events in the present appeal, and not any desire to expand on or to qualify the reasoning of my noble and learned friend.

The course of events was as follows. On 13th March, 1980, in the Crown Court at Ipswich the respondent (defendant) in these proceedings was arraigned on an indictment of great simplicity. It read as follows:

'Stephen Richard Lawrence is charged as follows:—

Statement of Offence:—

'Causing death by reckless driving, contrary to s.1 of the Road Traffic Act, 1972.

Particulars of Offence:—

'Stephen Richard Lawrence, on the 13th day of April 1979 at Lowestoft in the county of Suffolk, caused the death of Yvonne Letitia Crowther, by driving a motor vehicle on a road, namely, Victoria Road, recklessly.'

I pause at this stage only to point out that, owing to the delays which have mounted up in the South East and London, this simple case has taken a whole year less one month to come on for trial. That it took this length of delay to bring it on for trial is, of course, no criticism of the judge, counsel or solicitors in the present case. It is the cumulative result of the length and number of other cases with which your Lordships have not been concerned.

The trial pursued its course during 13th (Thursday), 14th (Friday) and 17th (Monday) March 1980. The learned judge commenced his summing-up on Tuesday, 18th March. After this summing-up and an interchange between the two counsel and the judge the jury retired at 11.28 am. They returned at 2.15 pm after deliberating for two hours and 47 minutes, when they were given a majority verdict direction. At 2.32 pm the jury delivered a note to the learned judge requesting further directions on the meaning of 'driving recklessly'. There was a further interchange between judge and counsel in the absence of the jury. At 3.15 pm the jury were summoned back and given a further direction. At 3.43 pm the jury convicted the respondent by a verdict of eleven to one, and after the usual procedure the learned judge sentenced the respondent to six months in prison and three years' disqualification.

On 20th May 1980 the whole trial aborted, because the Court of Appeal quashed the conviction on the grounds that both directions left 'so much unclear as to render the jury's verdict unsafe and unsatisfactory'. So other cases in the Crown Court at Ipswich were delayed by the judge, time consumed to no purpose during the better part of a week. But that has not been the end of the matter. At the request of the prosecution the Court of Appeal certified the three questions as of 'general public importance':

1. Is mens rea involved in the offence of driving recklessly?
2. If yes, what is the mental element required? 3. Is the following on a charge of driving recklessly a proper direction: "A driver is guilty of driving recklessly if he deliberately disregards the obligation to drive with due care and attention or is indifferent as to whether or not he does so and thereby creates a risk of an accident which a driver driving with due care and attention would not create"?

These three questions form the substance of the appeal. In certifying them the Court of Appeal refused leave to appeal. This was given subsequently by the Appeal Committee of your Lordships' House, possibly because the question of 'recklessness' in criminal cases was

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already before your Lordships in another context in *R. v. Caldwell*, (1), in which judgment has just been delivered.

I mention these facts because, altogether apart from the merits of the appeal, with which my noble and learned friend Lord Diplock intends to deal, I think there are lessons to be learned from these proceedings which ought urgently to be studied since they are directly relevant to the serious delays to which I have now drawn attention.

The facts of the case can be stated in stark simplicity. On 13th April 1979 at approximately 8.30 pm, a husband and wife, Mr and Mrs Crowther, decided to drive their van to an off-licence in Lowestoft in order to buy some soft drink for the children. They arrived at their destination at approximately 9 pm. Their van was parked on the opposite side of the road to the off-licence. Mr Crowther stayed in the van. Mrs Crowther crossed the road and entered the off-licence. When she came out, she stopped at the kerb. Her husband saw her blow him a kiss, and that was the last time he saw his wife alive. In crossing the road to return to the van there was a collision between herself and the second of two motor cyclists. The cycle involved in the collision was driven by the respondent. Mrs Crowther was killed instantaneously. Her body was carried 45 yards on the front of the cycle before the cycle stopped.

At the trial one solitary dispute of primary fact emerged. This was the speed at which the cycle was travelling. The prosecution led evidence intended to show that the cycle was travelling at a grossly excessive speed. Apart from the measurements on the road, there were witnesses of the accident, forensic evidence that the speedometer was jammed at 77 mph and as to the implications of this, and police evidence regarding the account of the accident by the accused. By contrast, the accused gave evidence and called witnesses who testified that the true speed only was 30 to 40 mph, technically illegal, since the area was built up, possibly careless, but most improbably reckless.

Given the nature of the case, one would hardly think that the case presented much difficulty for a jury to try or for the judge to sum-up in a manner calculated to lead them to a just and safe conclusion. If they were satisfied with the prosecution evidence to the extent required by the burden of proof in criminal cases they could hardly fail to convict. If they thought the defence evidence raised a reasonable doubt they could hardly fail to acquit. In the event they convicted by a majority, and their verdict was set aside as unsafe and unsatisfactory on the ground that the two directions on recklessness were so unclear. Neither the result, nor the delay in bringing the matter to trial, nor the course of the proceedings ought to afford any of us who are concerned in the administration of justice in any capacity much cause for satisfaction.

It has been said before, but obviously requires to be said again, that the purpose of a direction to a jury is not best achieved by a disquisition on jurisprudence or philosophy or a universally applicable circular tour round the area of law affected by the case. The search for universally applicable definitions is often productive of more obscurity than light. A direction is seldom improved and may be considerably damaged by

copious recitations from the total content of a judge's notebook. A direction to a jury should be custom-built to make the jury understand their task in relation to a particular case. Of course it must include references to the burden of proof and the respective roles of jury and judge. But it should also include a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides, and a correct statement of the inferences which the jury are entitled to draw from their particular conclusions about the primary facts. In the present instance there was only one issue of primary fact, the speed at which the cycle was travelling and I doubt whether a direction could have been faulted if the jury had simply been told that if they were satisfied that the prosecution had proved that the accused had been travelling at a grossly excessive speed they were entitled to infer that he had been driving recklessly and as a result had caused Mrs Crowther's death, that if so they should convict, and that if they were not so satisfied they should acquit. As it is, I feel sure that the Court of Appeal were correct in their belief that the jury may well have been so bemused with the effect of the summing-up that their verdict was unsafe and unsatisfactory, and that, if only for this reason, the appeal must fail. The verdict cannot be restored.

There is, however, a second reason why, in my judgment, the appeal by the prosecution must fail. Of the three questions of law certified by the Court of Appeal, I have no doubt that all three must be answered in the sense proposed by my noble and learned friend Lord Diplock. Since it follows from this that the third of these questions is answered in the negative, the learned judge's direction which broadly followed the formula contained in it was wrong in law. For this he can hardly be blamed since the formula broadly corresponds with that proposed by Eveleigh LJ in *R. v. Murphy* (2) (then just reported), which, to the extent described in detail by my noble and learned friend, must be considered overruled. I also associate myself with my noble and learned friend's affirmative answer to the first question, and the formulation of his answer to the second, with the reasoning leading up to which I also agree. Though it does not directly affect the three questions posed I share the distaste for the obsessive use of the expressions 'objective' and 'subjective' in crime. In all indictable crime it is a general rule that there are objective factors of conduct which constitute the so-called 'actus reus', and a further guilty state of mind which constitutes the so-called 'mens rea'. The necessity for this guilty state of mind has been increasingly emphasised of recent years (cf *R. v. Sheppard* (3)). This I regard as a thoroughly praiseworthy development. It only surprises me that there should have been any question regarding the existence of mens rea in relation to the words 'reckless', 'recklessly' or 'recklessness'. Unlike most English words it has been in the English language as a word in general use at least since the eighth century AD, almost always with the same meaning, applied to a person or conduct evincing a state of mind stopping short of deliberate intention, and going beyond mere inadvert-

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(2) 144 JP 360; [1980] 2 WLR 743

(3) ante, p.65

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ence, or, in its modern, though not its etymological and original sense, mere carelessness. The Oxford English Dictionary quotes several examples from old English, many from the Middle English period, and many more from modern English. The word was familiar to the Venerable Bede, to Langland, to Chaucer, to Sir Thomas More and to Shakespeare. In its alternative and possibly older pronunciation, and etymologically incorrect spelling (wretchless, wretchedly, wretchedness) it was known to the authors of the Articles of religion printed in the book of Common Prayer. Though its pronunciation has varied, so far as I know its meaning has not. There is no separate legal meaning to the word. This retains its dictionary sense, adequately, I believe, expounded by my noble and learned friend Lord Diplock. It is, of course, true that, in a legal context, the state of mind described as 'reckless' is discussed in connection with conduct objectively blameworthy as well as dangerous, while in common speech it is possible to conceive (for instance in the context of the winner of a military decoration in circumstances in which he is reckless of his own safety) of the use of the word without a blameworthy connotation. Now that my noble and learned friend has given it a lucid legal interpretation I trust that it will cause no more trouble to the profession, academics or juries. I also associate myself with what he has said about the Scottish case of *Allan v. Patterson* (4). R. v. Stephenson (5) was discussed before us, but in view of what has just been said before your Lordships in R. v. Caldwell (1) there is nothing I can usefully add, except that I respectfully accept the view of the majority in that case. Since the days of Noah, the effects of alcohol have been known to induce the state of mind described in English as recklessness, and not to inhibit it, and for that matter to remove inhibitions in the field of intention, and not to destroy intention. But that is a different question.

In the result the appeal fails.

LORD DIPLOCK: On Good Friday, April 13 1979, after night had fallen, the respondent ('the driver') was riding his motor cycle along an urban street in Lowestoft. The street was subject to a 30 mph speed limit and there was a good deal of other traffic using it at the time. The driver ran into and killed a pedestrian who was crossing the road to return from an off-licence shop to her car which was parked on the opposite side of the street. The driver was in due course tried on indictment for the offence of causing her death by driving a motor vehicle on a road recklessly, contrary to s. 1 of the Road Traffic Act 1972.

Apart from the very tragic consequences of this accident the case that the jury had to try was about as simple and straightforward as any case can be in which the charge is one of driving recklessly. The only question of fact that was in issue was the speed at which the driver was travelling immediately before the impact. The prosecution's case was that the motor cycle was being driven at between 60 and 80 mph and probably much nearer to the latter. The case for the defence was that the speed of the motor cycle was no more than 30 or, at most, 40 mph and probably nearer to the former. All that the jury had to do was to

(1) ante, p.211

(4) 1980, Sc LT 77; [1980] RTR 97

(5) 143 JP 592; [1979] 3 WLR 193





make up their minds whether, on that evidence, they were satisfied beyond reasonable doubt that the driver was in fact driving along this urban street, on which it was not disputed there was a good deal of other traffic, at a speed somewhere between 60 and 80 mph. If they were so satisfied, even the defence did not suggest that any sensible jury could come to any other conclusion than that he was driving recklessly, whereas, if they thought that his own estimate of his speed at 30 to 40 mph might be right, they ought to have found him not guilty, for the prosecution had not relied on any other aspect of his driving as constituting recklessness, apart from excessive speed.

I find it difficult to conceive that so simple a case could have taken more than a single day to try 20 years ago when, as a High Court judge, I was trying cases of the then newly-created offence of causing death by dangerous driving. I warmly endorse what Lord Hailsham has said about the tortoise pace at which cases in the Crown Court are nowadays so frequently allowed to amble on. It makes the trial itself a less effective and reliable means of achieving a just result and is one of the main causes of the long delays between committal and trial which are nothing short of a disgrace to our legal system.

In the course of his summing-up the deputy circuit judge gave to the jury a direction as to what amounted in law to 'driving recklessly'. This direction the Court of Appeal described with justification, but also with the utmost sympathy, as confused. And so it was, because it sought to combine the very recent definition of 'driving recklessly' in s. 2 of the Road Traffic Act 1972 that had been given by Eveliagh LJ in *R. v. Murphy* (2) ('the *Murphy* definition') with the definition of 'reckless' in s. 1(1) of the Criminal Damage Act 1971 which had been given by Geoffrey Lane LJ in *R. v. Stephenson* (5). This latter definition has been the subject of disapproval by this House in the immediately preceding appeal, *R. v. Caldwell* (1).

The jury too must have found the direction confusing for, after three and a half hours' retirement, they sought further elucidation from the judge. In substance he repeated to them the *Murphy* (2) direction and, after a further short retirement, the jury, by a majority of eleven to one, brought in a verdict of guilty.

The *Murphy* (2) direction is in the following terms:

'A driver is guilty of driving recklessly if he deliberately disregards the obligation to drive with due care and attention or is indifferent whether or not he does so and thereby creates a risk of an accident which a driver with due care and attention would not create.'

Whether the *Murphy* (2) direction is correct or not is the subject of the third question of law involved in the instant case that the Court of Appeal, in giving leave to appeal, has certified as being of general public importance. The other two are: '1. Is mens rea involved in the offence of driving recklessly? 2. If yes, what is the mental element required?'

(1) *ante*, p.211

(2) 144 JP 360; [1980] 2 WLR 743

(5) 143 JP 592; [1979] 3 WLR 193

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To answer these questions necessitates in the first instance a brief reference to the legislative history of those road traffic offences that had for so many years prior to 1977 been popularly known as 'careless driving' and 'dangerous driving' respectively.

The history starts with s. 1 of the Motor Car Act, 1903, which drew no distinction between driving 'recklessly' or 'negligently' or 'in a dangerous manner', so far as the gravity of the offence was concerned. It was in the following terms:

i '(1) If any person drives a motor car on a public highway recklessly or negligently, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the highway, and to the amount of traffic which actually is at the time, or which might reasonably be expected to be, on the highway, that person shall be guilty of an offence under this Act . . .'

ii This remained the law until it was repealed by the Road Traffic Act 1930, which made separate offences of dangerous driving and careless driving. The former was the more serious offence; it was triable on indictment as well as summarily and the penalties that could be imposed included imprisonment and were heavier than those for careless driving, which was triable summarily only.

iii The description of the offence of dangerous driving was:

'11. — (1) If any person drives a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road . . .

'12. — (1) If any person drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road . . .'

To these were added by s.8 of the Road Traffic Act 1956 the new offence of causing death by reckless or dangerous driving, the manner of driving involved in this offence being the same as under s.12(1) of the Road Traffic Act 1930. These descriptions of the offences were reproduced in ss.1 and 2 and in s.3 respectively of the Road Traffic Act 1972. Dangerous driving continued to be triable on indictment as well as summarily; careless driving remained triable summarily only.

Although the adverb 'recklessly' as descriptive of a manner of driving has been there ever since the single offence was split up into two of which one was treated as much graver than the other, the practice so far as living memory goes had been to charge defendants with driving "at a speed or in a manner which is dangerous to the public" and not with driving 'recklessly'." This is why the offence became popularly known as dangerous, not as reckless, driving; and juries, when the trial was on indictment, were instructed to consider whether in their judgment the defendant was driving in a manner that was dangerous to the public. It was not thought necessary to confuse them by talking about

'subjective' and 'objective' tests, although before 1963 they might have been told that to convict of dangerous driving they must be satisfied that the way in which the defendant was driving was something worse than a mere failure to show proper consideration for other people using the road or some minor misjudgment of the situation or momentary lack of attention. As a Queen's Bench judge I used so to direct juries myself, in trying cases of causing death by dangerous driving.

By its decision in *R. v. Evans* (6), however, the Court of Criminal Appeal for practical purposes abolished the difference between the standard of driving in careless driving and that involved in dangerous driving where danger to the public did in fact result. At the trial of Evans the judge had directed the jury:

in law it is now well settled that if the driving is in fact dangerous, and that dangerous driving is caused by some carelessness on the part of the accused, then however slight the carelessness, that is dangerous driving.'

This summing-up was approved on appeal. The court said:

If a man in fact adopts a manner of driving which the jury think was dangerous to the other road users in all the circumstances, then on the issue of guilt it matters not whether he was deliberately reckless, momentarily inattentive or even doing his incompetent best.'

This merging of the standards of defective driving that was to amount to the offences of careless and dangerous driving, respectively, leaving the only difference between the two offences that in the latter danger to the public had in fact been caused, led to an increase in the number of cases in which the prosecution charged the defendant with dangerous driving and the defendant, with his driving licence at stake, almost invariably elected to be tried by jury.

Your Lordships may take judicial notice of the fact that the amendment of ss.1 and 2 of the Road Traffic Act 1972 by s.50(1) of the Criminal Law Act 1977, which followed on the report of the Inter-departmental Committee on the Distribution of Criminal Business between the Crown Court and Magistrates' Courts in 1975 (Cmnd 6323), was to restore the difference in culpability between driving offences which attracted the severer penalties which could be imposed for offences under s.2 of the Road Traffic Act 1972, and so justified the right of the accused to elect trial by jury, and the offences under s.3 which did not attract penalties severe enough to justify any such right of election, and by this means to reduce the load of business in the Crown Court.

The amendment took the form of substituting for ss.1 and 2 of the Road Traffic Act 1972 the following new sections:

1. A person who causes the death of another person by driving a motor vehicle on a road recklessly shall be guilty of an offence.

2. A person who drives a motor vehicle on a road recklessly shall be guilty of an offence.'

(6) 127 JP 49; [1963] 1 QB 412

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The elimination of the reference to driving at a speed or in a manner dangerous to the public was obviously intended to remove the overlap between the offence in s.2 which gave a right to trial by jury and the lesser offence in s.3 that did not, which had resulted from the decision in *R. v. Evans* (6). Section 3 creates an absolute offence in the sense in which that term is commonly used to denote an offence for which the only mens rea needed is simply that the prohibited physical act (*actus reus*) done by the accused was directed by a mind that was conscious of what his body was doing, it being unnecessary to show that his mind was also conscious of the possible consequences of his doing it. So s.3 takes care of this kind of inattention or misjudgment to which the ordinarily careful motorist is occasionally subject without its necessarily involving any moral turpitude, although it causes inconvenience and annoyance to other users of the road. So there is no reason why your Lordships should go out of your way to give to the new s.2 a wide ambit that would recreate the former overlap with s.3.

This House has very recently had occasion in *R. v. Caldwell* (1), to give close consideration to the concept of recklessness as constituting mens rea in criminal law. The conclusion reached by the majority was that the adjective 'reckless' when used in a criminal statute, i.e. the Criminal Damage Act 1971, had not acquired a special meaning as a term of legal art, but bore its popular or dictionary meaning of careless, regardless, or heedless of the possible harmful consequences of one's acts. The same must be true of the adverbial derivative 'recklessly'.

The context in which the word 'reckless' appears in s.1 of the Criminal Damage Act 1971 differs in two respects from the context in which the word 'recklessly' appears in ss.1 and 2 of the Road Traffic Act 1972, as now amended. In the Criminal Damage Act 1971 the *actus reus*, the physical act of destroying or damaging property belonging to another, is in itself a tort. It is not something that one does regularly as part of the ordinary routine of daily life, such as driving a car or a motor cycle. So there is something out of the ordinary to call the doer's attention to what he is doing and its possible consequences, which is absent in road traffic offences. The other difference in context is that in s.1 of the Criminal Damage Act 1971 the mens rea of the offences is defined as being reckless whether particular harmful consequences would occur, whereas in ss.1 and 2 of the Road Traffic Act 1972, as now amended, the possible harmful consequences of which the driver must be shown to have been heedless are left to be implied from the use of the word 'recklessly' itself. In ordinary usage 'recklessly' as descriptive of a physical act such as driving a motor vehicle which can be performed in a variety of different ways, some of them entailing danger and some of them not, refers not only to the state of mind of the doer of the act when he decides to do it but also qualifies the manner in which the act itself is performed. One does not speak of a person acting 'recklessly', even though he has given no thought at all to the consequences of his act, unless the act is one that presents a real

(1) ante, p.211

(6) 127 JP 49; [1963] 1 QB 412

risk of harmful consequences which anyone acting with reasonable prudence would recognize and give heed to. So the actus reus of the offence under ss.1 and 2 is not simply driving a motor vehicle on a road, but driving it in a manner which in fact creates a real risk of harmful consequences resulting from it. Since driving in such a manner as to do no worse than create a risk of causing inconvenience or annoyance to other road users constitutes the lesser offence under s.3, the manner of driving that constitutes the actus reus of an offence under ss.1 and 2 must be worse than that; it must be such as to create a real risk of causing physical injury to someone else who happens to be using the road or damage to property more substantial than the kind of minor damage that may be caused by an error of judgement in the course of parking one's car.

The *Murphy* (2) direction, as it seems to me, is defective in this respect before one comes to any question of mens rea. By referring to the duty to drive with 'due care and attention', which is a direct quotation from s.3, it makes the standard of driving that must be maintained, in order to avoid the more serious offence of driving recklessly, the same as in the less serious offence under s.3 and thus perpetuates the very mischief which the 1977 amendments were intended to remedy. For when a decision has to be made whether to prosecute a driver for an offence under s.2 instead of under s.3 the only material available to the prosecution is evidence of what the driver actually did, the actus reus of the offence. The prosecution has no way of knowing at that stage, when the choice of charge has to be made, what was the state of mind of the driver when or immediately before he did it. It can only infer from what the driver was seen to do and any statement that he may have made.

I turn now to the mens rea. My task is greatly simplified by what has already been said about the concept of recklessness in criminal law in *R. v. Caldwell* (1). Warning was there given against adopting the simplistic approach of treating all problems of criminal liability as soluble by classifying the test of liability as being either 'subjective' or 'objective'. Recklessness on the part of the doer of an act does presuppose that there is something in the circumstances that would have drawn the attention of an ordinary prudent individual to the possibility that his act was capable of causing the kind of serious harmful consequences that the section which creates the offence was intended to prevent, and that the risk of those harmful consequences occurring was not so slight that an ordinary prudent individual would feel justified in treating them as negligible. It is only when this is so that the doer of the act is acting 'recklessly' if, before doing the act, he either fails to give any thought to the possibility of there being any such risk or, having recognised that there was such risk, he nevertheless goes on to do it.

In my view, an appropriate instruction to the jury on what is meant by driving recklessly would be that they must be satisfied of two things: first, that the defendant was in fact driving the vehicle in such a manner as to create an obvious and serious risk of causing physical

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(1) ante, p.211

(2) 144 JP 360; (1980) 2 WLR 743

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injury to some other person who might happen to be using the road or of doing substantial damage to property; and, secondly, that in driving in that manner the defendant did so without having given any thought to the possibility of there being any such risk or, having recognised that there was some risk involved, had none the less gone on to take it. It is for the jury to decide whether the risk created by the manner in which the vehicle was being driven was both obvious and serious, and, in deciding this, they may apply the standard of the ordinary prudent motorist as represented by themselves. If satisfied that an obvious and serious risk was created by the manner of the defendant's driving, the jury are entitled to infer that he was in one or other of the states of mind required to constitute the offence, and will probably do so; but regard must be given to any explanation he gives as to his state of mind which may displace the inference.

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In *Allan v. Patterson* (4), Lord Emslie in the High Court of Justiciary did apply the label 'objective' to the test of whether a driver was driving recklessly within the meaning of s.3 of the Act. While for reasons set out in greater detail in my speech in *R. v. Caldwell* (1) I think it is desirable in all cases of criminal liability to avoid the use of this label, I do not think that, having regard to the likelihood that the jury will draw the inference to which I have referred, the practical result of approaching the question of what constitutes driving recklessly in the way that was adopted by the Lord Justice-General in *Allan v. Patterson* (4) is likely to be any different from the result of instructing a jury in some such terms as I have suggested above. The same Act applies to both countries; it would be unfortunate if the interpretation put on it by the Scottish courts differed from that put on it by the courts in England and Wales.

I would give the following answers to the questions certified by the Court of Appeal: (i) mens rea is involved in the offence of driving recklessly; (ii) the mental element required is that, before adopting a manner of driving that in fact involves an obvious and serious risk of causing physical injury to some other person who may happen to be using the road or of doing substantial damage to property, the driver has failed to give any thought to the possibility of there being any such risk, or, having recognised that there was some risk involved, has none the less gone on to take it; (iii) the *Murphy* direction is wrong in the respects referred to earlier. Since the deputy circuit judge gave to the jury what was substantially the *Murphy* direction itself and also a somewhat confused version of it and both of these stated the law too unfavourably to the driver, this appeal must in my view be dismissed.

Lord Roskill

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LORD FRASER OF TULLYBELTON: I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Hailsham and Lord Diplock, and I agree with them. I would dismiss this appeal.

LORD ROSKILL: I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Hailsham and

(1) ante, p.211

(4) (1980) ScLT 777; (1980) RTR 97

Lord Diplock. I agree that this appeal fails for the reasons given by my noble and learned friend Lord Diplock in his speech. On the wider issues with which my noble and learned friends Lord Hailsham and Lord Diplock deal, I wish to express my respectful concurrence with what they have said. I would only add that but for the tragedy involved in this case, the charge would have been one of reckless driving which could and very probably would have been heard in a magistrates' court. It is difficult to believe that any magistrates' court would not have dealt with this case if not in a morning at least within one full day and reached the correct answer, whatever it might be.

LORD BRIDGE OF HARWICH; I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Hailsham and Lord Diplock. I fully agree with them both. Accordingly I too would dismiss this appeal.

Appeal dismissed

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Solicitors. *Sharpe, Pritchard & Co*, for *M.F.C. Harvey*, Ipswich; *Goldkorn, Davies & Co*, for *Norton, Peskett & Forward*, Lowestoft.

Reported by G.F.L. Bridgman, Esq., Barrister.

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R. v. AMERSHAM JUVENILE COURT. EX PARTE
DEAN EDWARD WILSON

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Magistrates — Juvenile court — Defendant 16 when charged and remanded — Defendant becoming 17 before hearing of case — Age fixed when defendant first appears or is brought before court in connexion with offence charged — Children and Young Persons Act, 1963, s. 29(1), as amended by Children and Young Persons Act, 1969.

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On October 31, 1980, the applicant, who was then under the age of 17, was charged before justices with theft. After being charged he was remanded on police bail to appear before a juvenile court on November 11. Meanwhile, on November 6 he attained the age of 17. The juvenile court, relying on s. 29 of the Children and Young Persons Act, 1963, as amended by the Children and Young Persons Act, 1969, were of opinion that they could treat him as a juvenile, and accordingly they refused to allow him to go for trial by jury and themselves tried him and sentenced him to three months' detention. He applied for a judicial review of the decision of the juvenile court.

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Held: whether a person should be tried by a juvenile court or by a magistrates' court concerned with charges against persons aged 17 and over depended on his age when he first appeared before a magistrates' court; the common law right to trial by jury was not to be lightly removed, but s. 29 of the Act of 1963, as amended, had that effect when it applied; the applicant, however, first appeared before the juvenile court after he had attained the age of 17; he should have been bailed by an adult justices' court which should have proceeded to investigate the charge as examining magistrates; accordingly the Divisional Court made an order quashing the proceedings before the juvenile court.

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Per Curiam: Those who arrest and charge or lay informations against a person who is in the juvenile/adult borderline age group should take all reasonable steps to find out exactly when he will attain the age of 17. If he is to be brought or summoned to appear before a court for the first time on a date when he will have attained the age of 17 the court selected or specified in the summons should be an adult court. If he will not have attained the age of 17 it should be a juvenile court. If the accused is properly brought before a juvenile court and thereafter attains the age of 17 s. 29 will apply. Those who have doubts about the age of the accused can bring him or summon him to appear before either type of court. If it is the juvenile court and that court agrees that he appears to be under the age of 17, but it subsequently emerges that he is 17 or over, no harm will have been done because the court will be able to rely on s. 48 of the Children and Young Persons Act, 1933. If it is the adult court, the court can, on learning the true facts, remit the case to a juvenile court or retain it: see s. 56(1) of the Children and Young Persons Act, 1933, and s. 7(8) of the 1969 Act.

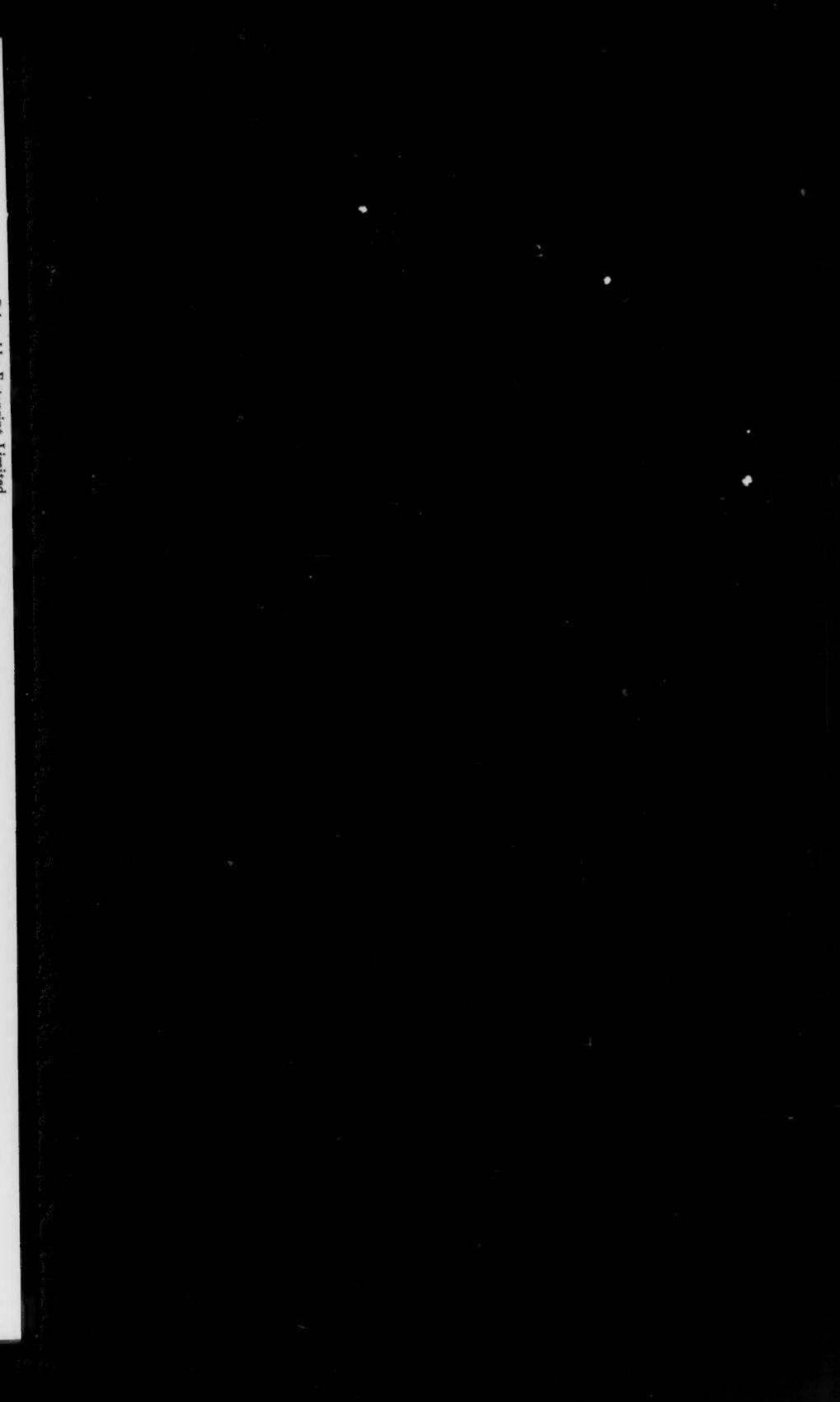
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Application for judicial review of a decision of the Amersham Juvenile Court.

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C. Tyrer for the applicant.

P. Shears for the respondent prosecutor.





DONALDSON, L.J.: The judgment I am about to deliver is the judgment of the court; Dean Edward Wilson applies for judicial review of a decision of the Amersham Juvenile Court which, on 9th December, 1980, convicted him of robbery and sentenced him to three months' detention. Within a few days he was released on bail. His grievance is that he was denied a trial by judge and jury, but was instead tried and sentenced by the justices sitting as a juvenile court. Both at the time when the offence is alleged to have been committed and at the time when he was charged, Wilson was under the age of 17. After being charged on 31st October, 1980, he was remanded on police bail to appear before the juvenile court of 11th November, 1980. Meanwhile on 6th November, 1980, he attained the age of 17 and thus, for the purposes of the criminal law, became an adult instead of a young person. The juvenile court justices thought that they could treat him as a juvenile in reliance upon s. 29 of the Children and Young Persons Act, 1963. We have to decide whether they were right.

The powers and duties of adult and juvenile magistrates' courts are quite different. In the case of magistrates' courts concerned with charges against adults, there are a number of offences which can only be tried on indictment, that is to say by judge and jury, a number which can only be tried summarily, and a number which may be tried "either way", that is summarily or on indictment. A charge of robbery is one which in the case of an adult can only be tried on indictment and the magistrates' duty is to inquire into it as examining magistrates with a view to deciding whether there is a case fit for trial. If there is, they commit the accused to a Crown Court. In the case of juvenile courts, magistrates are in general required to try all charges summarily unless the charge is one of homicide.

The dividing line between those who are the concern of the juvenile court magistrates and those who are the concern of the adult court magistrates emerges most clearly from two statutory provisions. The first is s. 6(1) of the Children and Young Persons Act, 1969, which provides that:

"Where a person under the age of seventeen appears or is brought before a magistrates' court on an information charging him with an offence, other than homicide, which is an indictable offence within the meaning of the Magistrates' Courts Act, 1952, he shall be tried summarily unless"

he is charged with a grave offence or he is charged with an adult and a joint trial is necessary in the interests of justice. The second is s. 19 of the Criminal Law Act, 1977, which deals with the procedure to be adopted when an adult is charged with an "either way" offence and is in the following terms:

"Sections 20 to 24 below shall have effect where a person who has attained the age of seventeen appears or is brought before a magistrates' court on an information charging him with an offence triable either way."

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These statutes show that the dividing line is the age of the accused when he "appears or is brought before a magistrates' court". In context this must mean when he first appears or is brought before such a court in connection with the offence charged. This first appearance may, as in this case, be when the accused surrenders to police bail. In other cases it may be when he appears in response to a summons or when he is brought before the court from police custody, the police not having granted bail. There are also statutory provisions to cover the situation in which the precise age of the accused is in doubt and it is accordingly uncertain whether he is a young person and, as such, the concern of the juvenile court or whether he is an adult and the concern of an adult court (see, for example, ss. 48 and 99 of the Children and Young Persons Act, 1933, s. 80(3) of the Criminal Justice Act, 1948, s. 126(5) of the Magistrates' Courts Act, 1952, and s. 70(3) of the Children and Young Persons Act, 1969). However, in the present case the applicant's age was known.

Section 29 of the Children and Young Persons Act, 1963, as amended by the 1969 Act is concerned with a quite different problem, namely, what is to happen if a young person attains the age of 17 and so becomes an adult and the concern of the adult magistrates' court before the end of the proceedings against or concerning him in a juvenile court. It is in the following terms:

"Provisions as to persons between the ages of 17 and 18. (1) Where proceedings in respect of a young person are begun before a juvenile court under s. 1 of the Children and Young Persons Act, 1969, or for an offence and he attains the age of seventeen before the conclusion of the proceedings, the court may deal with the case and make any order which it could have made if he had not attained that age."

This section is wholly consistent with the statutory approach of classifying offenders as adult or juvenile by reference to their age when they first appear or are brought before a magistrates' court, provided that on the true construction of the section proceedings are "begun" at that time and not at the earlier time when an information is laid or a charge preferred. We have no doubt that it should be so construed, particularly bearing in mind the manner in which care proceedings are begun. It is on the defendant first appearing or being brought before a court that his age is fixed for the purpose of all these provisions. In so holding, however, we must make mention of two decisions which might suggest a different approach.

The first is *R. v. Brentwood Justices. Ex parte Jones* (1). There the Divisional Court was concerned to construe a transitional provision contained in sched. 14 to the Road Traffic Act, 1972, whereby certain parts of the Act did not apply

"in relation to proceedings commenced before the coming into force of that provision".

This court held that proceedings were "commenced" when a charge was preferred. It is sufficient to say that the court was concerned with a different statute in a different context. The second authority is the very recent decision of this court in *R. v. St. Albans Juvenile Court. Ex parte Godman* (2). The offence charged was theft which, in the case of an adult, is an "either way" offence. The justices considered that "the relevant point in time for the court to decide whether the hearing was to proceed in accordance with the provisions of s. 6 of the Children and Young Persons Act, 1969, or with the provisions of s. 19 of the Criminal Law Act, 1977, was when the juvenile first appeared in court charged with the offence, and the relevant age for the purpose of these sections was the age of the juvenile at that time". When Godman first came before the juvenile court magistrates he was still 16 and he was asked to plead to the charge. He having pleaded "Not guilty", the further hearing of the case was adjourned until a later day by which time he was 17. Ackner LJ., said:

"It is clear from the facts set out above that Nigel Godman has not as yet begun to be tried for the offence alleged against him. All he has done is to enter a plea of not guilty. Accordingly the question that had to be decided on 13th November was: How was this young man of 17 to be tried? To this question the short answer would appear to be in accordance with the procedure laid down by ss. 20 to 24 of the Criminal Law Act, 1977, having regard to the provisions of s. 19(1) as set out above. To this counsel for the justices, makes but one short submission. Under s. 12(2) [of the Criminal Law Act, 1977] it is clear that the mode of trial is decided before the plea is entered. Here, the plea having been entered, it is too late to seek to alter the mode of trial. Counsel is perfectly correct in his submission that s.21 presupposes in the ordinary case that the mode of trial will be decided before the plea is taken, but this is no ordinary case. Parliament has given to those who have attained the age of 17 a statutory right in certain circumstances, of which this is an example, to be tried by a jury. Of course Parliament could have provided that, if the applicant is 16 when charged, he has no entitlement to trial by jury even though he attains 17 before his trial commences, but very clear words would be needed to enact such a provision. I would not accept that it could be achieved by the side wind upon which counsel for the justices must not be overlooked that there is a common law right to be tried by jury and such a right is not to be lightly removed. The procedural difficulty which is pinpointed by counsel's submission can be simply dealt with by the accused, who has pleaded but has not yet been tried, being asked, in the event of his reaching 17 years, whether he still consents to be tried summarily. The court will at the same time, pursuant to its statutory obligation under s.21(2), provide the explanation there stipulated.

"I have been at pains to stress that at no material time had the trial of the applicant been embarked upon. If on 9th October, in addition to taking his plea, the court had heard evidence and then

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adjourned the case part-heard, I would certainly tend to the view that the matter then became one for the exercise of the justices' discretion under s.48 of the 1933 Act. It is however not necessary finally to determine that point on this application."

Skinner, J. said:

"I agree. On the facts which have been outlined by my Lord, two questions arise on this application: (1) had the applicant a right at that stage to elect trial by jury? (2) if not, had the justices a discretion to allow him to elect for trial by jury? The answers to these questions lie wholly in the statutory provisions which have already been referred to by my Lord. In my judgment the decisive provision is s.19 of the Criminal Law Act, 1977. That Act deals with a fundamental right of any citizen over 17 charged with a serious offence. It is mandatory in its terms. Subsection (1) reads: 'Sections 20 to 24 . . . shall have effect where a person who has attained the age of seventeen appears or is brought before a magistrates' court on an information charging him with an offence triable either way.' The applicant in this case had attained the age of 17, and he did not appear before the magistrates' court, charged with an offence triable either way. Subsection (2) provides that everything the court is required to do by ss.20 to 23 must be done before any evidence is called. Sections 20 to 23 lay down the familiar procedure followed when an offence triable either way normally comes before the courts.

"Counsel for the justices in his short, but nevertheless effective, argument for the respondents submitted that once the plea had been taken in the magistrates' court or the juvenile court, that determined the court of trial once for all and he drew our attention to the provisions of s.21(2)(b). This deals with the position if the magistrates have decided that an offence triable either way may be tried summarily and goes on to give the accused his right of election between summary trial and trial by jury. Counsel points out that if the accused had already pleaded, and had pleaded guilty, then it would seem inappropriate to give him the warning set out in the subsection. That was the only real anomaly that he could point to if the argument advanced on behalf of the applicant were to succeed. It is not enough, in my judgment, to displace the clear meaning of s.19 which itself provided the point of no return in subs. (2). The watershed, or point of no return, for the purpose of the problem which arises in this case, is the calling of evidence and not the taking of the plea. Thus the answer to the first question which I have posed earlier is that the applicant had a right to trial by jury at the stage at which he claimed it on 13th November, 1979.

"Turning to the second question, if I am right in the above, I would accept the submission by both counsel that s.29(1) of the Children and Young Persons Act, 1963, applies only to questions of disposal and not to questions of trial. Until it was amended by the Children and Young Persons Act, 1969, that section merely dealt with what are broadly called 'care proceedings' and the amend-

ment in 1969 would, for example, allow a court which had made a finding of guilty against a 16 year old and adjourned the case for reports to resume the hearing and pass sentence if he attained 17 years during the adjournment.

"However if I am wrong in my interpretation of s.19 of the 1977 Act, then the scheme of the statutory provisions has to be looked at again from a different angle. In view of the conclusion I have reached on the first question, it is neither necessary nor desirable to do this now."

We have quoted the relevant parts of the judgment in full because they show that (i) counsel for the justices placed no reliance upon s.29 of the Children and Young Persons Act, 1963; (ii) both counsel were agreed that it related only to questions of disposal and not to questions of trial; and (iii) the court did not really consider s.29 which was not even mentioned in the judgment of Ackner, L.J. In the present case both counsel are equally agreed but in a contrary sense, namely, that s.29 does relate both to questions of trial and of disposal. As they point out, the section in its original unamended form read "the court may continue to deal", but Parliament when adding the words "or for an offence" in 1969 deleted the words "continue to". This suggests that it now applies to the proceedings ab initio. Furthermore, the words "deal with the case" stand as a phrase on their own and are used in contradistinction to the words "make any order", the latter clearly covering all questions of disposal and leaving the earlier words as only really referable to questions of trial.

In the circumstances we feel free to give effect to our own view of the construction of s.29. We do not for one moment dissent from the proposition that the common law right to trial by jury is not to be lightly removed, but in our judgment s.29 has this effect where it applies. In fact, on our construction the section has no application to the case of the applicant, since he first appeared before the juvenile court after he had attained the age of 17, but it would have applied in *Godman's* case (2) where the applicant appeared before the court while he was still 16, albeit only for a plea to be taken. However, in the light of the joint submission of counsel in that case, it is perhaps not surprising that our construction of s.29 was not adopted and that the section was virtually ignored.

In our view, those who arrest and charge or lay information against persons who are in the juvenile/adult borderline age group should take all reasonable steps to find out exactly when they will attain the age of 17. If they are to be brought or summoned to appear before a court for the first time on a date when they will have attained the age of 17, the court selected or specified in the summons should be an adult court. If they will not have attained the age of 17, it should be a juvenile court. If the accused is properly brought before a juvenile court and thereafter attains the age of 17, s.29 will apply. If those concerned have doubts about the age of the accused, they can bring him or summon him to appear before either type of court. If it is the juvenile court and that court agrees that the accused appears to be under the

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age of 17, but it subsequently emerges that he is 17 or over, no harm will have been done because the court will be able to rely upon s.48 of the Children and Young Person Act, 1933. If it is the adult court, the court can, upon learning the true facts, remit the case to a juvenile court or retain it (see s.56(1) of the Children and Young Persons Act, 1933, and s.7(8) of the 1969 Act). So far as the applicant is concerned, in our view he should have been bailed to appear before an adult court and that court should, and no doubt would, have proceeded to investigate the charge as examining magistrates. We will therefore make an order quashing the proceedings before the juvenile court.

BINGHAM, J.: I agree.

Solicitors: *Geoffrey Wicks & Co.*, Chesham; *C. S. Hood*, Chief Prosecuting Solicitor, Thames Valley Police Authority.

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Reported by G.F.L. Bridgman, Esq., Barrister.

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QUEEN'S BENCH DIVISION
(Donaldson, L.J., and Forbes, J.)

November 7, 1980

R. v. SOUTHAMPTON JUSTICES. EX PARTE DAVIES

Magistrates — Sentence — Imprisonment — Consecutive terms — Separate periods for non-payment of separate fines — Magistrates' Courts Act, 1952, s.64(1)(3), s.65(2), sched. 3.

On June 20, 1979, the applicant was ordered by justices to pay £232.63 in respect of a fine, costs, and compensation. On January 22, 1980, the justices made an order against him for the payment of £245 payable at the rate of £5 a week as fines for seven motoring offences. On February 13, 1980, the applicant appeared before the justices on a means enquiry. There was then £173.63 still outstanding from the order of June, 1979, and the full sum of £245 from the January order. He was committed to prison by the magistrates for 30 days in respect of the amount outstanding on the June, 1979, order and a total of 95 days in respect of the sum of £245, the period of 95 days being made up of two periods of 30 days in respect of two offences and five periods of seven days, all to run consecutively, relating to the fines imposed in respect of the various motoring offences of which he had been convicted, the periods of imprisonment then fixed by the magistrates being the maximum permitted by sched. 3 to the Magistrates' Courts Act, 1952. On a motion for certiorari,

Held: where a warrant was issued for an outstanding sum the period for which the defendant might be committed must not exceed the maximum for the aggregate sum found on the warrant; if separate periods for non-payment of separate fines outstanding were to be fixed, separate warrants would have to be issued: the fixing of consecutive sentences of imprisonment for non-payment of fines was subject to certain principles which usually included that consecutive sentences were inappropriate where several offences arose out of the same incident, and, even when they were appropriate, the sentencing authority should consider whether the totality of the sentence was excessive having regard to the totality of the criminal activity: in the present case the justices, in fixing the term of imprisonment for which the warrant was to issue, should have considered the maximum period applicable to the aggregate of the sums outstanding, only one warrant for the total of 59 days imprisonment was issued, the maximum period was 30 days; accordingly, the order fixing the period of imprisonment would be quashed and there would be substituted an order fixing the period as 30 days.

Motion for an order of certiorari to bring up and quash an order of Southampton justices committing the applicant to prison for 59 days.

P. Towler for the applicant.

The respondents did not appear.

FORBES, J: In this case counsel moves on behalf of Neil Osborne Davies to bring up and quash an order of the Southampton justices committing him to prison for 59 days. The case raises a novel point about justices' powers to impose terms of imprisonment for non-payment of fines.

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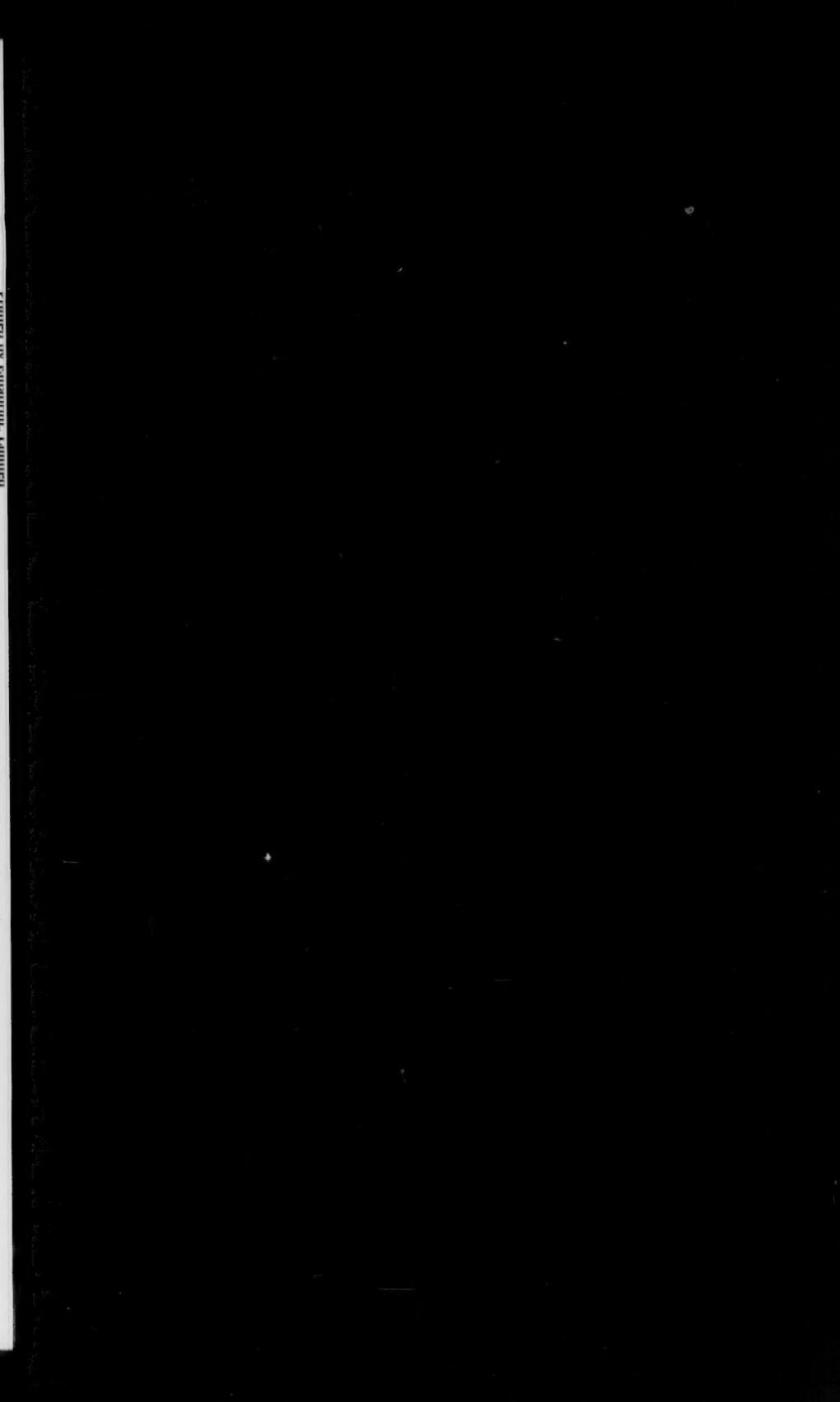
The facts are these. On the 20th June, 1979, Mr. Davies appeared before the Southampton justices and was ordered to pay a total of £232.63 in respect of a fine, costs and compensation.

On the 22nd January, 1980, he appeared before the same justices in respect of a number of motoring offences. He was convicted of them and sentenced to payment of fines as follows: (1) driving without insurance — £60; (2) using a vehicle with a defective tyre — £25; (3) driving without due care and attention — £60; (4) driving without "L" plates — £15; (5) driving unsupervised — £25; (6) using a vehicle with defective brakes — £25; (7) using a vehicle with a defective tyre — £25. In addition the magistrates disqualified him from driving, ordered him to pay £10 costs in respect of the first offence, and made an instalment order for the payment of the total of £245 at the rate of £5 per week.

On the 13th February, 1980, Mr. Davies appeared again before the same court on a means enquiry. At that date there was still outstanding £173.63 from the June order and the full sum of £245 from the January, 1980, order. He was accordingly committed to prison by the magistrates for 30 days in respect of the amount outstanding on the earlier order and a total of 95 days in respect of the sum of £245. Each of these committal orders was suspended on payment of the sum of £15 a week, starting on the 18th February, 1980. The period of 95 days was made up as follows: (1) £60 and costs — 30 days; (2) £25 — 7 days; (3) £60 — 30 days; (4) £15 — 7 days; (5) £25 — 7 days; (6) £25 — 7 days; (7) £25 — 7 days. Each of these periods was made to run consecutively, making a total of 95 days. On the 24th September, 1980, it became clear to the justices' clerk's staff that the instalment payments, as a condition of which the justices had suspended the applicant's committal, had not been paid. Accordingly a warrant was issued for his committal to prison for 59 days, the balance of the total of 95 days. This period of 59 days was arrived at in a manner I shall refer to in a moment. In fact before the warrant was executed the applicant of his own volition appeared before the Southampton justices on the 8th October, 1980, asking them to order that the warrant be withdrawn. The justices declined, and the applicant was accordingly conveyed to prison on the authority of that warrant. The applicant in his affidavit suggests that the magistrates committed him to prison on that day, but it seems clear to me that the correct way of looking at what occurred on the 8th October is as I have set out.

By the 24th September, 1980, the applicant had paid off the whole of the sum due under the June order and £81.37 towards the sum of £245 due for the convictions in January. The justices' clerk had applied that £81.37 to the outstanding sum of £245 in this way. The first £70 was applied to cancel the first period of 30 days for non-payment of the £60 fine and costs; the balance of £11.37 was used to reduce the second period of 30 days, that is for offence No. 3, by 6 days, because £11.37 bears the same relationship to £60 as does 6 days to 30 days.

It is now necessary to consider the provisions of sched. 3 to the Magistrates' Court Act, 1952, as amended by s.59 of the Criminal Law Act, 1977. Schedule 3 reads thus:





"Subject to the following provisions of this schedule, the periods set out in the second column of the following table shall be the maximum periods applicable respectively to the amounts set out opposite thereto, being amounts due at the time the imprisonment is imposed."

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There then follows a table starting with

An amount not exceeding £25 — 7 days An amount exceeding £25 but not exceeding £50 — Fourteen days An amount exceeding £50 but not exceeding £200 — Thirty days",
finishing with "An amount exceeding £5,000 — Twelve months".

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It will be seen that the periods of imprisonment fixed by the magistrates on the 13th February, 1980, were in fact the maxima permitted under this table. Paragraph 2 of sched. 3 reads:

"Where the amount due at the time imprisonment is imposed is so much of a sum adjudged to be paid by a summary conviction as remains due after part payment, the maximum period applicable to the amount shall be the period applicable to the whole sum reduced by such number of days as bears to the total number of days therein the same proportion as the part paid bears to the whole sum; provided that in calculating the reduction required under this paragraph any fraction of a day shall be left out of account and the maximum period shall not be reduced to less than five days."

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The main argument of counsel for the applicant is that when imposing terms of imprisonment under s.65(2) of the Magistrates' Courts Act, 1952, sched. 3 to that Act must be read as if the justices in imposing a term of imprisonment for non-payment of fines were subject to the maxima applicable to the aggregate of the fines imposed. He says this is so for three main reasons. First, the application of the schedule produces anomalies if it is not so construed. Secondly, the Act of 1952 is a consolidating Act (except for amendments detailed by the Lord Chancellor to Parliament, and there are none relevant here), and its predecessor, the Summary Jurisdiction Act, 1879, s.5, can be read as indicating that at any rate partial aggregation was intended by Parliament; and, therefore, the 1952 Act provisions must be assumed to adopt the same approach as those of 1879. Thirdly, says counsel, in any event the period of imprisonment ordered by the justices ran counter to well-established principles affecting the imposition of consecutive sentences, and, as there is no appeal to the Crown Court against sentences of imprisonment imposed by magistrates for non-payment of fines, the applicant is entitled to come to this court for redress under the procedure for judicial review.

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Before turning to examine these contentions it would be as well to be clear about two points. First, the powers of the justices are derived from s.64 and s.65 of the Magistrates' Courts Act, 1952. Section 64(1) gives the power, where default is made in payment of sums due by conviction or order, to issue a distress warrant or a warrant committing the defaulter to prison. By s.64(3) the period for which a defaulter may be sent to prison is limited to the appropriate maximum set out in sched. 3. Section 65(2) empowers the justices to

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fix a term of imprisonment and postpone the issue of the warrant until such time and on such conditions as the court thinks just. It is clear to me that on the 13th February, 1980, the justices here decided to fix the appropriate terms of imprisonment and to postpone the issue of the warrant so long as the applicant paid £15 a week. This they did under s.65(2), and it meant that on failing to pay the £15 in any one week the warrant would then and there issue, unless before its issue the justices took steps as, say, on an application by the defaulter, to stay the warrant. It is, accordingly, the decision of the justices on the 13th February, 1980, which is before us and not their decision not to recall the warrant, assuming they had power to do so, on the 8th October.

The second point is that there can be no doubt that it is competent to the justices to impose consecutive terms of imprisonment in default of payment of fines imposed on separate offences; this is clear from a perusal of s.108 of the Act of 1952. The broad effect of sub-s (1) and (2) of that section, as amended by the Criminal Law Act, 1977, sched. 12, is to impose overall maxima of six months and twelve months respectively for consecutive sentences in respect of summary offences and offences triable either way tried summarily.

Subsection (5) reads:

"For the purposes of this section a term of imprisonment shall be deemed to be imposed in respect of an offence if it is imposed as a sentence or in default of payment of a sum adjudged to be paid by the conviction . . ."

Counsel for the applicant does not challenge that there is power to impose consecutive sentences in respect of default in payment of fines imposed for two or more offences. He says, as I have indicated, that sched. 3 must be read as involving maxima for the aggregate of the sums unpaid and not for each of the constituent sums.

He made his submission with great skill and persuasiveness, and as a result I have changed my original attitude towards his application, but it is not necessary to consider his submissions in detail because I believe that there is another and more fundamental objection to the course the justices adopted.

What the justices purported to do on the 13th February, 1980, was to fix a term of imprisonment under s.65(2) and postpone the issue of the warrant. But these powers themselves derive from s.64. On turning to that section it will be seen that under subs. (1)

"Where default is made in paying a sum adjudged to be paid . . . the court may issue a warrant committing the defaulter to prison". Subsection (3) brings in the maxima:

"The period for which a person may be committed under such a warrant . . . shall not . . . exceed the period applicable to the case under the sched. 3 to this Act".

It seems plain to me from these provisions that where a warrant is issued for an outstanding sum the period must be the maximum for the aggregated sum found on the warrant. If separate periods for non-payment of separate fines are to be fixed, then separate warrants would

have to be issued. In coming to this conclusion I am not to be taken as encouraging the issue of many separate warrants where a number of separate fines is outstanding. Each case will clearly have to be decided by the justices on its own facts. In doing so they should, it seems to me, adopt the approach which formed the subject-matter of counsel for the applicant's third and most eloquent submission: the fixing of consecutive sentences of imprisonment for non-payment of fines is still the imposition of consecutive sentences and as such is subject to certain well-known principles. These include that, usually, consecutive sentences are inappropriate where several offences arise out of the same incident, and that, even when they are appropriate, the sentencer should consider whether the totality of the sentence is not excessive having regard to the totality of the criminal activity.

Having said that, I have no doubt that in fixing the term of imprisonment for which the warrant was to issue the justices should have considered the maximum period applicable to the aggregate of the sums outstanding. We have not been shown the warrant, but it is clear from the affidavit of the justices' clerk that in this case only one warrant for the total of 59 days' imprisonment was issued. Accordingly the maximum period in this case is 30 days. The order fixing the period of imprisonment at 59 days should, therefore, be quashed and there should be substituted an order fixing the period as 30 days.

Before leaving this case I should refer to the case of *R. v. Metropolitan Stipendiary Magistrate, Ex parte Green* (1). All I need say about it is that that was argued on wholly different submissions, namely, that s.108 of the Act prevented the magistrates from imposing terms of imprisonment of more than six months in the aggregate, and that the significance of the wording of s.64 was not brought to the court's attention.

DONALDSON, L.J.: I agree.

Order accordingly

Solicitors: *Gregory Rowcliffe & Co* for Abels, Southampton.

Reported by G.F.L. Bridgman, Esq., Barrister.

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QUEEN'S BENCH DIVISION
(Donaldson, L.J., and Bingham, J.)
February 9, 1981

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R. v. SWANSEA JUSTICES. EX PARTE PURVIS

*Magistrates — Res judicata — Dismissal of prosecution in absence of
witnesses — Fresh information preferred.*

ii

The applicant was charged before magistrates with theft. The case was adjourned until June 10, 1980, when the prosecution asked for an adjournment on the ground that their witnesses were not in court. The magistrates refused to grant an adjournment, and in the absence of any evidence they dismissed the case. On June 24 the prosecution preferred a fresh information, and when that came before the magistrates it was contended on behalf of the applicant that he had a complete defence as all issues in dispute had already been decided. The prosecution argued that there had been no investigation of the case on the merits and in the absence of such an investigation there could be no plea in bar. The magistrates heard the case and convicted the applicant who now applied for judicial review of the matter to quash the conviction.

iii

Held: "trial on the merits" in this context meant, not the weighing of evidence, but that the accused had been in jeopardy of conviction; the application would be granted.

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Per Curiam: The correct course for the prosecution to adopt where in their view magistrates had acted unreasonably in refusing an adjournment was not to bring further proceedings as had been done in this case but to make an application for judicial review of the magistrates' decision. Where magistrates are concerned with the matter as examining magistrates and refuse to commit for trial it is open to the prosecution to lay a further information and in an appropriate case to support it with further and better particulars.

v

Application by John Purvis for judicial review to quash his conviction of theft by Swansea magistrates on July 28, 1980.

Donaldson, L.J.

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W. Cronin for the applicant.
J. Diehl for the respondent.

DONALDSON, L.J.: In this matter Mr. John Purvis applies for judicial review directed to the Swansea magistrates' court and designed to quash his conviction on a charge of theft on the 28th July, 1980.

The facts were these. On a different information Mr. Purvis came before the Swansea magistrates' court on the 14th May, 1980, the case then being listed for the taking of a plea of guilty or, in the event of a plea of not guilty being entered, for the case to be adjourned and a date for the hearing to be fixed. In fact he pleaded not guilty and the case was adjourned until the 4th June. On the 4th June the case was not reached and was again adjourned, this time to the 10th June. On the 10th June the prosecution found themselves in a difficulty in that their principal witness, a store detective, was not in court. She was in fact ill, that fact being unknown to the prosecuting solicitor until that day. There was a further problem in that a police officer who was to give evidence for the prosecution had also failed to attend. His non-

attendance, it subsequently emerged, was the result of a failure by the police authorities to warn him that his attendance was required. The case was called on at 2.30 in the afternoon, and the prosecuting solicitor applied for an adjournment on the ground that his witnesses were not there.

This is always a situation which causes some difficulty for magistrates. On the one hand they have to do justice to the accused and make certain that he is not brought to court unnecessarily frequently or has a charge hanging over his head for an unreasonably long time. On the other hand, they have to do justice to the prosecution and it has to be accepted that there are occasions when, through no fault of the prosecution, witnesses fail to attend. How the matter should be balanced in any particular case ought to be capable of being resolved within the discretion of magistrates, but if they go beyond the limits of their discretion application can be made to this court for relief in the nature of judicial review. In the present case the magistrates resolved the difficulty by refusing an adjournment, and in the absence of any evidence they dismissed the prosecution.

The prosecutor decided that he would prefer a fresh information and did so on the 24th June. When that came before the magistrates on the 28th July the applicant's solicitor argued that the court had no jurisdiction to try the matter, or, alternatively, that his client had a complete defence on the basis that all issues in dispute had already been decided. The matter, it was argued, was *res judicata* and, while there is some authority for the proposition that *autrefois acquit* as a plea in bar does not technically exist in a magistrates' court since it is not a court of record, by analogy the same position would be reached and the magistrates should not proceed to hear the case. The magistrates did not accept that submission. They did proceed to hear the case and they convicted Mr. Purvis. It is that conviction which Mr. Purvis now seeks to have quashed.

In my judgment, he is plainly entitled to have it quashed. The matter is governed by a number of cases, and the latest in the series is the decision of this court in *British Railways Board v. Warwick and Others* (1). The transcript is dated 17th June, 1980; I know not whether it has been reported, but there the facts were virtually the same as those in the present case, and Lord Lane, C.J., giving judgment, said:

"Consequently one is left with this simple series of facts: there was an arraignment, there was an election to be tried summarily, there was a plea of not guilty, there was no evidence proffered by the prosecution, there was in effect a verdict of not guilty: and the case was dismissed."

Counsel for the prosecution seeks to argue that there has been no investigation of the present case on the merits, and in the absence of an investigation on the merits there can be no plea in bar. I think that the phrase "on the merits" is slightly misleading because it suggests that there has to be evidence on one side at least, and possibly on both sides, a weighing of the evidence, and then a decision in that sense.

(1) June 17, 1980. Not reported

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That is not the meaning of "a trial on the merits" in this context. In this context what is meant is that the accused shall have been in jeopardy of conviction. That is made quite clear by the decision of this court in *Haynes v. Davis* (2), and it is put perhaps most clearly in a dissenting judgment of Lush, J., although let me make it clear at once that there was no difference between the three members of the court as to the principle to be applied, the dissent came as to their application to the facts of that particular case. Lush, J., said:

"the expression 'acquittal on the merits' must be qualified, but in my view the expression is used by way of antithesis to a dismissal of the charge upon some technical ground which had been a bar to the adjudicating upon it. That is why this expression is important, however one may qualify it, and I think the antithesis is between an adjudication of not guilty upon some matter of fact or law and a discharge of the person charged on the ground that there are reasons why the court cannot proceed to find if he is guilty."

In that case the magistrates found that the defendant was not guilty, not because there was anything to stop them finding whether he was guilty, no bar to their jurisdiction to adjudicate, but simply because on the evidence, or more accurately on the total lack of it, they had no option but to dismiss the charge once they had decided not to adjourn. There was, therefore, in the sense in which the phrase is used in this context, an adjudication upon the merits.

Counsel for the prosecution referred us to *Ellis v. Burton* (3) where the court was concerned with the phrase "upon the merits" in s. 44 of the Offences Against the Person Act, 1861. That is quite a different context, and I will not lengthen my remarks by explaining exactly why it is different. It is sufficient for present purposes to say that there the words "upon the merits" appear in the statute. They do not appear in any statute in the context with which we are concerned. In the present context "on the merits" is a phrase which distinguishes between where a court is in a position to convict but does not do so and the position where a court is unable to proceed to consider the question of conviction or acquittal because it has no power, or thinks it has no power, to adjudicate. We certainly cannot use decisions on the meaning of "on the merits" in a wholly different context in order to apply them in the context of this sort of case.

The other thing that I ought to mention is this. I think there is some confusion in the minds of the solicitors for the prosecutor in this case as to what is the correct course to adopt where, in the prosecutor's view, magistrates act unreasonably in refusing an adjournment.

In the case of a matter which does not fall to be dealt with on an indictment the right course, if the facts will stand it, is to challenge the magistrates' decision to refuse an adjournment by way of application for judicial review. It is not to bring further proceedings before the magistrates as was done in this case. Where the case is one to be tried

(2) 79 JP 187; [1915] 1 KB 332

(3) 139 JP 199; [1975] 1 All ER 395; [1975] 1 WLR 386

on indictment, or more accurately where the magistrates are concerned with the matter as examining magistrates and refuse to commit for trial, a different situation arises. It is then open to the prosecution to lay a further information and in an appropriate case to support it with further and better particulars, and no question of autrefois acquit can arise. The only fetter on the prosecution's powers to go on preferring informations at weekly intervals is that the magistrates have a power, which I do not doubt that they would exercise in a proper case, to refuse to commit on the grounds that the preferring of further informations was an abuse of the process of the court. For those reasons I would grant the application and quash the conviction.

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Reported by G.F.L. Bridgman, Esq., Barrister.

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Lambert v.
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QUEEN'S BENCH DIVISION
(Donaldson, L.J., and Kilner Brown, J.)
December 19, 1980

Queen's Bench
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Road Traffic – Breath test – Refusal – Arrest of person driving – Arrest by police officer on private property of driver – Validity – Road Traffic Act, 1972, s.8(5).

ii

The respondent, driving a car, was followed by a police car driven by a police officer in uniform until he entered the driveway of his house. The police officer followed and told him that he had checked the speed of his car while on the road and that it had shown a constant speed of 60 miles an hour whereas the speed on the road was restricted to 40 miles an hour. He asked the respondent to provide a specimen of breath for a breath test. The respondent at first agreed, but later he refused, saying that the officer was a trespasser on private property and so had no authority to ask for a breath test. The officer then arrested him under s.8(5) of the Road Traffic Act, 1972. Justices found that the respondent had revoked any licence or permission which he had given to the officer to be on his property and dismissed the charges. The prosecution appealed.

iii

Held: the respondent's statement to the police officer that the officer was trespassing on private property was sufficient notice to revoke any implied licence or permission to him to be on the driveway, and thereafter the police officer was under a duty to withdraw from the respondent's property with all reasonable speed; if the officer did not do so he was no longer acting in the execution of his duty and he was not entitled to require the respondent to provide a breath test; the appeal would be dismissed.

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Case Stated by Biggleswade, Bedford, justices.

*G.D. Mercer for the appellant, George Patrick Lambert.
M. Lowe for the respondent, Clive James Roberts.*

Donaldson, L.J.

v

DONALDSON, L.J.: On 13th August, 1980, the respondent appeared before the justices for the county of Bedford sitting at Biggleswade to answer three motoring charges. The first alleged that he had exceeded a speed limit. The second alleged that when driving a motor vehicle on a road, namely the A507, he failed without reasonable excuse to provide a specimen of breath when required to do so by a uniformed police constable, contrary to s.8(3) of the Road Traffic Act, 1972. The third alleged that, having been arrested under s.8 of the 1972 Act, while at a police station he failed without reasonable excuse to provide a specimen of blood or urine for a laboratory test when required to do so by a police constable, contrary to s.9(3) of the 1972 Act.

vi

The two 'breathalyser' charges were dismissed by the justices and the prosecutor now appeals by Case Stated. The facts as found by the justices were as follows:

"At 11.12 p.m. on Thursday 29th May, 1980, Police Constable



INCORRECT VOLUME NUMBER, SHOULD READ VOLUME 145.

Tinkler was on duty in uniform driving a marked police car along the A507 road at Clifton in the county of Bedfordshire, travelling from the direction of the Henlow roundabout towards Shefford. He was accompanied by P.C. Shotbolt who was acting as observer. For a distance of two tenths of a mile they followed and checked the speed of a Ford Escort motor car, index number VBH 557N. The speed recorded on the speedometer of the patrol car was a constant 60 miles per hour. While travelling along the A507 road the Escort car indicated a left turn and then turned left into Hitchin Lane.

The police vehicle followed, and the Escort car turned right into a private driveway leading to the rear of number 12 Hitchin Lane. P.C. Tinkler followed the car along the driveway on foot and saw the vehicle come to a stop. He approached the driver, the sole occupant of the vehicle, the respondent Mr Roberts. The officer then told the respondent that he had checked the speed of his car along the A507 road for two tenths of a mile at a constant speed of 60 miles an hour, and informed him that that part of the road was restricted to a speed limit of 40 miles an hour, and he cautioned the respondent who replied to the effect that he, the officer was on private property and that he was trespassing. At that point the officer noticed that the respondent's breath smelt strongly of intoxicating liquor, and he told the respondent that, as he had committed a moving traffic offence, he was required to provide a specimen of breath for a breath test. On being asked whether he was willing to provide such a breath specimen the respondent replied: "Yes". The officer then asked him if it was more than twenty minutes since he had last consumed an alcoholic drink and the respondent replied: "No, only about ten minutes". The officer then informed him that he could wait for another ten minutes before giving the breath test. The respondent replied: "All right, I want to make a telephone call to my solicitor because we are on private property and I want to make sure that what you are doing is right". The officer agreed to his making a telephone call provided that he could accompany him, and he followed him into his house where the respondent's wife was present. The officer and the respondent then went to the respondent's mother's house at 14 Hitchin Lane where the respondent made a telephone call. Following that telephone call the officer and the respondent went back to the respondent's home and waited in his kitchen until the ten minutes had elapsed. At the expiration of that time the officer informed the respondent that the twenty minutes had now elapsed since he had last consumed alcohol and he was required to provide a specimen of breath for a breath test. The respondent replied that he was waiting for a telephone call before doing anything. The officer then offered him an Alcotest R80 device and told him to inflate it. He asked the respondent if he understood, and the respondent replied: "Yes but I'm not going to inflate it until I've had the 'phone call". The officer offered a breath test device again, the respondent again refused and referred to the fact that the officer was on private property and a trespasser, and the officer told him that he was being arrested for refusing to provide a specimen of breath for a breath test. At this point the telephone bell rang in the house next door. The respondent attempted to brush past the two

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officers in an attempt to go and answer it, and the officers pursued him into the garden, arrested him, and handcuffed him.'

Perhaps I should interpolate at this point that the house next door was the respondent's mother's house, and it was possible to get from one to the other without going on to the public highway. Resuming the facts as found by the justices:

'The events inside the house occurred in the presence of the respondent's wife, then in the presence of his mother, and later in the presence of an aunt who came on the scene from the respondent's mother's house having received the second telephone call. At various times these three persons protested to the police about their attempts to obtain a breath specimen when on private property. They also protested about the methods used in arresting the respondent. Following his arrest, the respondent was conveyed to Biggleswade police station where in due course he was required to provide a specimen of breath and then of blood or urine, and he was told of the consequences of a failure to provide a specimen. The respondent indicated that he was unwilling to provide a specimen. P.C. Tinkler then asked him to listen carefully to a second request, and then made a formal request for a specimen of blood and explained again the consequences of a failure to provide such a specimen. The respondent again refused to supply it. At 12.35 a.m. on the following day he was formally charged with the three offences and cautioned, and to each charge the respondent replied, "No". He was then bailed to appear at Biggleswade Magistrates' Court.'

The justices' conclusions are expressed in the following terms:

'We were of the opinion that by the time he was formally required to provide a specimen of breath for a breath test, that is while he was still on the driveway to his house, the respondent had stated that he was on private property, and that he subsequently refused to comply with the police officer's requirement because he believed that the police had no right to administer a breath test in those circumstances, and he wished to obtain advice over the telephone from his solicitor before he would agree to take a test. By the time that requirement was repeated some ten minutes later the police officers could have been in no doubt that they were on the respondent's private property, that the respondent was objecting strongly to providing a breath specimen in those circumstances, and they had been told by the respondent on at least four occasions that they were on private property and were trespassers. They were also told this by the respondent's wife and at a later stage by his mother. For these reasons we came to the conclusion that we should apply the principles laid down in *Morris v. Beardmore*(1) and hold that the police officer had acted unlawfully in requiring the respondent to give a breath test and in effecting an arrest on that requirement being refused. It followed that having come to that conclusion, the further requirement made at Biggles-

(1) 144 JP 331; [1980] 2 All ER 753; [1980] 3 WLR 283

wade police station that the respondent should provide a specimen of blood or of urine for a laboratory test was unlawful, and we therefore acquitted the respondent on both charges.'

The prosecution appealed, the questions for the opinion of this court which are posed by the Case Stated being as follows:

'i. Were we right to form the view on the facts found by us that any permission or licence to the police to be on the respondent's private property had been revoked by the respondent's initial statement that they were on private property and trespassing, reinforced during the ten minutes which followed by statements to the same effect made to the officers, not only by the respondent but also by his wife and his mother?

'ii. Were we right to apply the principles laid down in *Morris v. Beardmore*(1) to the facts found by us in this case, namely, that a police constable in uniform, making a requirement under s.8(1) of the Road Traffic Act, 1972, who had had his licence or permission to be on private property withdrawn by the occupier, thereby lost his right, while remaining on the property as a trespasser, to require the defendant to give a breath test, and thereupon his power of arrest in the event that his request be refused?'

Although s.8(1) and (3) of the Road Traffic Act, 1972, are in terms confined to breath tests of 'any person driving or attempting to drive a motor vehicle on a road or other public place', it is well settled law that a requirement to take a breath test can be made off the road so long as it is made in the course of a chain of action following sufficiently closely on an observed driving on the road (see *R. v. Jones* (2)). Accordingly, no problem arises out of the mere fact that the first requirement to provide a specimen of breath was made when the respondent was off the road. The problem with which this appeal is concerned arises out of the fact that this requirement was made at a time when the police officer was on the respondent's own driveway and, as the justices have found, after his licence to be there had been revoked.

The first question posed by the justices is whether they were right to form the view that this licence was revoked. There can be no doubt that in the absence of a locked gate or some notice such as 'police keep out', police officers, like all other citizens, have an implied licence to enter on a driveway and to approach the door of a dwelling house if they have, or reasonably think that they have, legitimate business with the occupier. But it is a licence which is revocable without prior notice. In the present case the justices have found that the respondent's statement that the police officers were on private property and were trespassing was such a notice. I am quite unable to say that this was wrong, although an alternative view of the respondent's conduct, taken as a whole, is that he was simply disputing the right of the police

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(1) 144 JP 331; [1980] 2 All ER 753; [1980] 3 WLR 283

(2) 134 JP 215; [1970] 1 All ER 209

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officers to require a breath test on private property but was not effectively revoking their licence.

Once the licence was revoked, the police officers were under a duty to withdraw from the respondent's property with all reasonable speed and, if they did not do so, they were not thereafter acting in the execution of their duty (see *Davis v. Lisle*(3)). They did not do so and the question is whether in the light of that failure they were still entitled to require the respondent to take a breath test.

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This was considered by the House of Lords, in the context of s.8(2) and (5) of the Road Traffic Act, 1972, in *Morris v. Beardmore*(1). The decision is recorded in the headnote in the All England Law Reports as follows:

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'Because a constable's power under s.8(2) of the 1972 Act to require a person to provide a specimen of breath was a serious erosion of the citizen's common law rights, it was to be presumed that, in the absence of express provision to the contrary, Parliament did not intend any further encroachment on those rights by a constable acting unlawfully, whether in breach of the criminal law or the civil law. In order to be able validly to require a person to take a breath test a constable not only had to be in uniform but had to be acting in the execution of his duty, which he was not if at the time of making the request he was a trespasser on the premises of the person to whom he had made the request; and evidence of an accused's failure to comply with a request in such circumstances was not admissible under the rule that all relevant evidence ought to be admitted at trial no matter how it was obtained but subject to judicial discretion to exclude it, because evidence of an accused's failure to comply with a requirement to provide a specimen of breath was not evidence of an offence that the accused had already committed but direct evidence of the ingredients of the offence itself. Since it was not disputed that the police officers were trespassing at the time they required the appellant to provide a specimen for a breath test it followed that the appeal would be allowed.'

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It was contended on behalf of the prosecutor that that decision is distinguishable because it related to s.8(2), requiring a breath test following an accident, and not to s.8(1), requiring a breath test on a road or other public place. This distinction is difficult to maintain in principle, because the question of the rights of a trespassing police officer can only arise when the motorist has left the road or other public place and when it does arise the same issues are involved whether the requirement is based on s.8(1) or on s.8(2).

However, some superficial support for this submission is to be derived from the speech of Lord Diplock who said:

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'Different considerations may apply where the requirement to undergo a breath test is made under sub-s (1) [of s.8].'

(1) 144 JP 331; [1980] 2 All ER 753; [1980] 3 WLR 283

(3) 100 JP 280; [1936] 2 All ER 213; [1936] 2 KB 434

Lord Edmund-Davies does not appear to have made any such distinction. Lord Keith confined his consideration to s.8(2). Lord Scarman treated the two subsections as indistinguishable and there are no signs that Lord Roskill was minded to make any distinction.

What then is the explanation of Lord Diplock's caveat? I think that it may be attributable to a point spelt out by Lord Keith when he said:

'It can be envisaged that circumstances may arise where the requirement to undergo a breath test is made by a police constable in a situation where he, and perhaps also the person of whom the requirement is made, are trespassers on the property, enclosed or unenclosed, of a third party. It is to be understood that the reasons for holding the requirement to have been invalid in the present case have no necessary application to that situation.'

It is inherently more likely that both motorist and police officers will be trespassing on the property of a third party in a 'hot pursuit' case under s.8(1) than where s.8(2) applies. But in the present case the property was not that of a third party and, in my judgment, the decision in *Morris v. Beardmore* obliges us to hold that the justices were correct in concluding that the original request to take a breath test was not lawfully made. This being the case, the arrest and subsequent requirement to give a specimen of blood or urine at the police station were also unlawful and the respondent was entitled, as a matter of law, to be acquitted of both the breathalyser offences.

KILNER BROWN J.: I agree.

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Kilner Brown, J.

Appeal dismissed.

Solicitors: *Morris and Bridgeman, Bedford; Balderton, Warren & Co.*

Reported by G.F.L. Bridgman, Esq., Barrister.

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QUEEN'S BENCH DIVISION
(Lord Lane, C.J., and Lloyd, J.)
January 26, 1981

MATTHEWS v. MORRIS

Queen's Bench
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Magistrates — Re-opening of case — Discretion — Prosecution case closed in error.

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The appellant being charged with larceny, the respondent, a police officer, had in his possession a statement by the owner of the stolen property which the police had served on the appellant under s.9 of the Criminal Justice Act, 1967, but on the day of the hearing of the case by the justices, the police forgot to produce the statement in court and at the end of the case for the prosecution it was submitted on behalf of the appellant that there was no case to answer. Thereupon the respondent asked leave of the justices to re-open the case for the prosecution. The justices granted leave, continued the hearing, and found the charge against the appellant proved. The appellant appealed on the ground that the justices had no discretion to allow the prosecution to re-open the case.

Held (dismissing the appeal): the justices had a discretion whether or not to allow the prosecution to re-open their case and it was not limited to where what had been omitted was merely formal or technical or arising ex improviso but included matters of substance; the discretion must always be exercised judicially; the discretion in the present case was clearly exercised judicially, the evidence which the prosecution failed to adduce was undisputed and its omission was due to a simple mistake.

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Case Stated by Waltham Forest justices.

B. Clarke for the appellant
J.F. Crocker for the respondent.

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Lloyd, J.

LLOYD, J.: The facts of this case, which I take from the Case Stated, are shortly as follows. On 14th June, 1979, Miss Rosemary Matthews, who is the appellant, had been playing a game of rounders. When the game was over, she went into the changing room to take some money from her sister's handbag to pay for her omnibus fare home. On a bench in the changing room was a purse belonging to a Miss Debbie Carter. The appellant took £13 in cash from that purse. On her way home she was stopped by one of the teachers from her school, who had been supervising the game of rounders, and in due course reported the appellant to the police. The appellant was subsequently arrested by the respondent, Police Constable David Morris, and charged with stealing the £13. The police had in their possession a statement from Miss Debbie Carter, which they had duly served on the appellant under s.9 of the Criminal Justice Act, 1967, but on the day of the hearing they forgot to produce the statement in court. At the end of the case for the prosecution it was submitted on behalf of the appellant that there was no case to answer as there was no evidence before the court to show who was the owner of the money. The respondent,

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fairly and properly, admitted his mistake. He asked leave of the justices to re-open the case for the prosecution. Leave was granted, and the justices went on with the hearing. They found the charge against the appellant proved and gave her a conditional discharge.

The question for the opinion of this court now is whether the justices were right to re-open the case. Counsel who appears here for the appellant makes two main submissions, which, if I may say so, he has put before the court very fairly and succinctly. His first submission is that, save in the case of rebuttal evidence, evidence which has been available to the prosecution *ab initio* and which is clearly relevant cannot be adduced to remedy a defect in the case for the prosecution once it has been closed. His second submission is that by way of exception the justices have a limited discretion to allow the prosecution to re-open the case to admit evidence which has been overlooked, provided it is of a formal or technical nature and is not disputed.

The justices were referred to two cases before exercising their discretion. The first was *Middleton v. Rowlett* (1). In that case there was a charge of dangerous driving, and the prosecution omitted to prove that the defendant was the driver of the car at the material time. There was a submission of no case to answer, just as there was here. The prosecution then applied to be allowed to re-open their case, but the application was refused. The prosecution contended in this court that the justices were obliged to allow the prosecution to re-open the case. It was held that the justices had a discretion in the matter and this court refused to interfere. At the end of his judgment, Lord Goddard, C.J., giving the leading judgment of the court, said:

"Though I think what has happened is regrettable and I do not think the court would have interfered for a moment if the justices had exercised their discretion the other way, I do not think we can say that they were bound to exercise their discretion in favour of the prosecution."

That case was followed in *Pigott v. Sims* (2) where the prosecution omitted to put before the court an analyst's certificate on a charge of driving a motor car with an excessive proportion of alcohol in the blood. On that occasion the justices exercised their discretion in favour of allowing the prosecution to re-open the case, Melford Stevenson, J., giving the leading judgment of the court, said:

"As the case stood, at the close of the prosecution's case there was indeed no material which would have justified a conviction had that evidence stood alone. But there is abundant authority for the proposition that, whether a defect in the prosecution's case is merely procedural or whether it goes to the substance of the case, the justices have a discretion even though the case for the prosecution has been closed to permit

(1) 118 J.P. 362; [1954] 2 All E.R. 277
 (2) [1973] R.T.R. 15

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the prosecution to put in that evidence. I cannot sufficiently emphasise that it is matter for discretion, and these justices took the view that it would be a proper exercise of their discretion to permit those certificates to be put in at the stage at which they were invited to receive them."

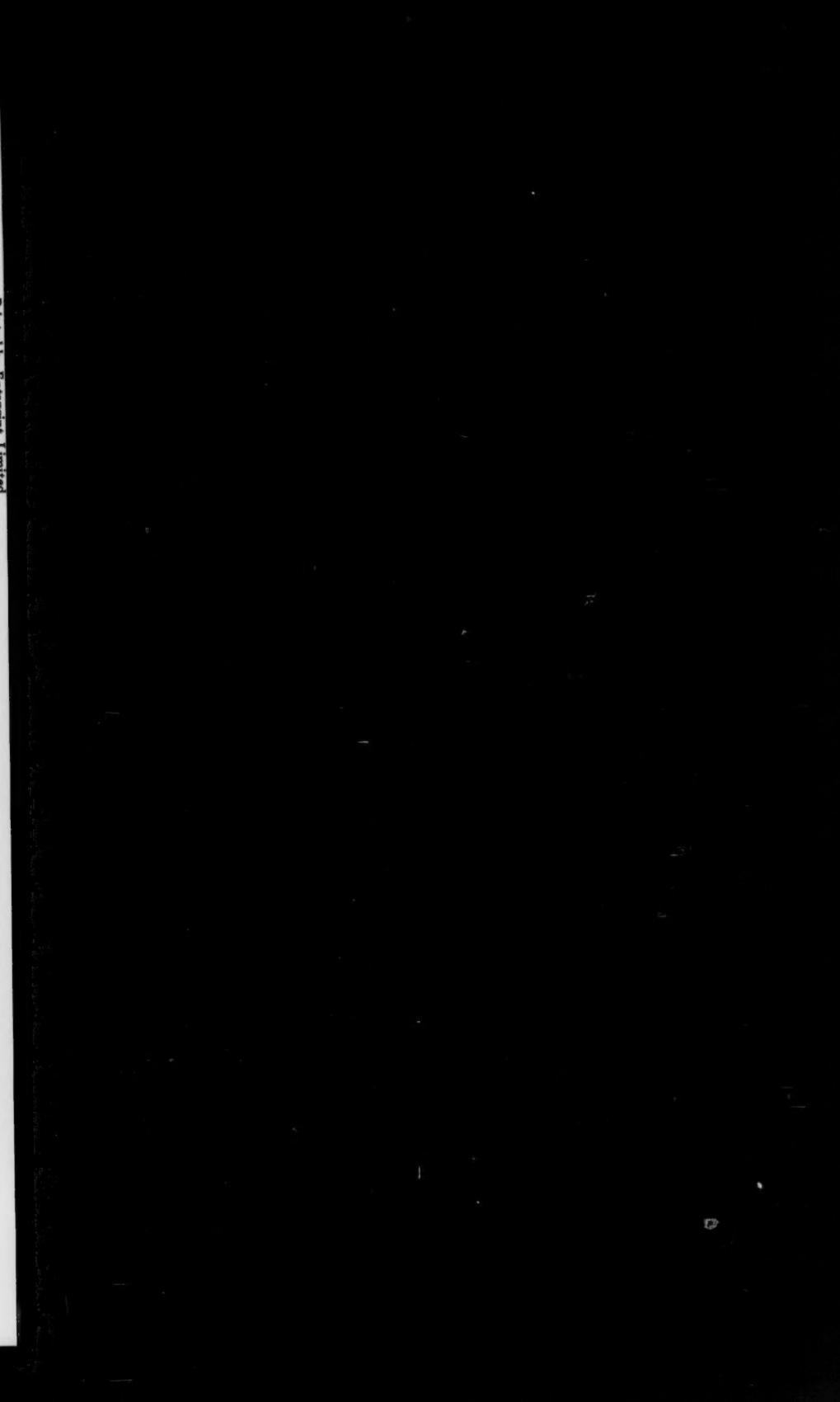
Then Melford Stevenson, J., goes on to refer to the decision in *Middleton v. Rowlatt* (1) and quotes the passage from Lord Goddard's judgment to which I have already referred.

It is clear from those authorities that the justices had a discretion in the present case whether to allow counsel for the prosecution to re-open his case. Contrary to the submission of counsel for the appellant the discretion is not limited to cases where what has been omitted is merely formal or technical. It includes matters of substance. The essence of a discretion is that it can be exercised in more than one way. It must always, of course, be exercised judicially, but there is no case for arguing that the discretion was not exercised judicially here. In addition, this particular discretion must be exercised carefully, having regard to the need to be fair to the defendant and to reach finality. That was made clear by the Court of Appeal in *R. v. Pilcher* (3), a case on which counsel relied strongly. I do not read that case as shutting the door on the exercise of the discretion or confining it to matters which have arisen *ex improviso*. The evidence which the prosecution failed to adduce in the present case was undisputed. It was omitted by a simple mistake. I can see no injustice of any kind to the appellant in allowing the case to be re-opened. For the reasons I have given I would hold that the magistrates had a discretion in the matter with which this court should not interfere. I would dismiss the appeal.

LORD LANE, C.J.: I agree that this appeal should be dismissed. The two cases cited by counsel for the appellant in support of his argument, which he asks us to take into consideration against those set out in the case, are first of all *R. v. Pilcher* (3) a decision of the Court of Appeal (Criminal Division), to which Lloyd, J., has just referred. The judge in that case had admitted the evidence, not on the basis that it was in any way technical or non-contentious, but on the basis that it was in the interests of justice in a broad sense that the jury should hear the evidence, and what the Court of Appeal in the judgment of the court delivered by the Lord Chief Justice said, was that it was too broad a basis upon which to judge matters of this sort. The other case to which our attention was drawn was *R. v. Day* (4). One has only to look at the facts of that case to see how far it is removed from the facts of the present case because there it was a case involving an allegation of forgery. The evidence which the prosecution sought to call after the close of their case was that of no less a person than a handwriting expert. Those two cases are a great distance away from the facts of the present case where the statement which the prosecution were seeking to bring in after the close of their case was as non-contentious as one could possibly get.

(3) (1974) 60 Cr. App R 1

(4) 104 J.P. 181; [1940] 1 All E.R. 402





that of no less a person than a handwriting expert. Those two cases are a great distance away from the facts of the present case where the statement which the prosecution were seeking to bring in after the close of their case was as non-contentious as one could possibly get.

In those circumstances I agree that the justices had a discretion to admit this evidence and their decision was arrived at judicially. In those circumstances I agree that this appeal should be dismissed.

Appeal dismissed.

Reported by G. F. L. Bridgman, Esq., Barrister.

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QUEEN'S BENCH DIVISION
(Waller, L.J., and Park, J.)
May 22, 1980

R. v. Hatfield JJ.
Ex parte Castle

R. v. HATFIELD JUSTICES. EX PARTE CASTLE

Magistrates — Summary trial — Procedure — Offences of same or similar character — Criminal Law Act, 1977, s.23(7)(a).

The defendant was charged before justices with four offences — using threatening words and behaviour whereby a breach of the peace was likely to be occasioned, assaulting a police constable in the execution of his duty, damaging his uniform, and wilfully obstructing him when acting in the execution of his duty. The justices came to the conclusion that the defendant was entitled to elect trial by jury. The prosecution applied for a judicial review of this decision and sought an order prohibiting the justices from committing the defendant for trial on the charge of criminal damage.

Held: for s.23(7)(a) of the Criminal Law Act, 1977, to apply to a case the offences which were said to be of the same or similar character must have the characteristics of being triable either summarily or on indictment, being similar in fact and in law, and they must all form part of a series; without deciding whether the offences in the present case formed part of a series it was sufficient to say that none of the other characteristics was present and the offence of criminal damage remained an offence which was triable only summarily; an order was made directing the justices to hear the charge summarily.

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Application by Police-Inspector Douglas Castle, of the Hertfordshire Constabulary, for judicial review of an order made by Hatfield justices.

J Haworth for the applicant.

J P Wadsworth for the respondent.

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WALLER, LJ.: This is an application by Inspector Castle ('the applicant') for leave to apply for judicial review of a determination

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made on 10th March, 1980, by the Hatfield justices sitting at Hatfield magistrates' court. The application is for an order prohibiting the magistrates from committing the defendant for trial on a charge of criminal damage and involves the consideration of s.23(7) of the Criminal Law Act, 1977.

The defendant was charged before the Hatfield magistrates with four offences — that he did, on 24th December, 1979, use threatening words and behaviour whereby a breach of the peace was likely to be occasioned, contrary to s.5 of the Public Order Act, 1936, as amended; that on the same day he assaulted a constable in the execution of his duty, contrary to s.51(1) of the Police Act, 1964; that on the same day without lawful excuse, he damaged a police uniform, contrary to s.1(1) of the Criminal Damage Act, 1971; and that on the same day he wilfully obstructed the constable when acting in the execution of his duty, contrary to s.51(3) of the 1964 Act.

The value of the damage to the police uniform tunic amounted to £23.67. The magistrates in their affidavit go on to say, not surprisingly, that they were of opinion that the damage to the police uniform tunic did not exceed £200, that the provision of s.23(7)(a) applied to the offence of damaging a police uniform, and that the offence of criminal damage was suitable for summary trial. It is to be noted that the other three offences were triable summarily only. When the court proceeded in accordance with the provisions of s.21 of the 1977 Act, the defendant elected to be tried by jury. The magistrates, having had their attention drawn to an article in the *Justice of the Peace* publication (*Criminal Damage — Which Way Now*, December 2, 1978, p.684), came to the conclusion that the defendant was entitled to elect trial by jury, and it is that issue which comes before us.

Sections 19 to 23 of the 1977 Act deal with procedure for determining the mode of trial of offences which are triable either way. Section 23(1) deals particularly with certain offences which are triable either way but are made triable summarily if the value involved is small. Section 23(1) provides:

'If the offence charged by the information is one of those mentioned in the first column of sch. 4 to this Act . . . then, subject to subs. (7) below, the court shall, before proceeding in accordance with s.20 above, consider whether, having regard to any representations made by the prosecutor or the accused, the value involved (as defined in subs.(10) below) appears to the court to exceed the relevant sum . . .'

Offences under s.1 of the Criminal Damage Act, 1971, are included in sch. 4 to the Act. It was in relation to that that the magistrates came to the opinion that the value was £23.67. As the section goes on to say, 'For the purposes of this section the relevant sum is £200', it was below that sum. Section 23(2) provides:

'If . . . the value involved does not exceed the relevant sum, the court shall proceed as if the offence were triable only summarily, and ss.20 to 22 above shall not apply.'

But s.23(7) reads as follows:

'Subsection (1) above shall not apply where the offence charged – (a) is one of two or more offences with which the accused is charged on the same occasion and which appear to the court to constitute or form part of a series of two or more offences of the same or a similar character . . .'

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Counsel for the applicant submits to this court that the offences here were neither of a similar character nor did they constitute what formed part of a series. They all occurred, submits counsel, at virtually the same time. They all occurred in relation to the same officer and therefore they were not part of a series. The time probably was not more than a minute or two. Secondly, they were not offences of a similar character. Threatening words and behaviour whereby a breach of the peace is likely to be occasioned contrary to s.5 of the 1971 Act, has nothing in common with criminal damage. Assaulting a constable has nothing in common with criminal damage, except that in this case the damage was to a constable's uniform, but criminal damage may be done to anything. Criminal damage has nothing in common with wilful obstruction of a constable in the execution of his duty.

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Counsel for the applicant submits that the authority of the Court of Appeal, decided after the article in the *Justice of the Peace*, makes that clear. He referred, first, to *R. v. Camberwell Green Magistrates, ex parte Prescott* (1) where the magistrate had refused to give the defendant the right to elect trial by jury. The episode was one where the defendant obstructed a police officer while he was looking for somebody and, in obstructing him, damaged a pair of his trousers to the value of £12. There was an offence of obstructing a police officer in the course of his duty and of criminal damage to trousers so that it was similar to at any rate part of the offences charged in this case. Ormrod LJ said:

'When one turns to the nature of the offences charged in this case, one is an offence of obstructing a police officer in the course of his duty and the other is the offence of criminal damage to the officer's trousers. It seems to be plain beyond any question that the two offences are not of the same or similar character, nor can I see on the facts of this case how these two offences could possibly be described as a "series". There is no series.'

He went on to dismiss the appeal.

If one applies that decision to the present case, clearly the obstruction is not similar to criminal damage. In my judgment, equally clearly, insulting behaviour is not similar to criminal damage. Nor is the offence of assault similar to criminal damage. There may be occasions when they are similar in what happens but they are not similar offences.

Counsel for the applicant has drawn attention to a passage in the speech of Lord Pearson in *Ludlow v. Metropolitan Police Comr* (2) where Lord Pearson was considering the elements of similarity for the purpose of the Indictments Act 1915, sch. 1, r 3. The argument ap-

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(1) (1979) C.A. Transcript 356

(2) 134 JP 277; [1970] 1 All ER 567; [1971] AC 29

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parently having been on the one side that it was factual similarity referred to in the statute and on the other side legal similarity, Lord Pearson expressed the following view:

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'I think the proper conclusion to be drawn from the judgments [of the Court of Appeal] as a whole is that both the law and the facts have been and should be taken into account in deciding whether offences are similar or dissimilar in character.'

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Waller, L.J.

Both of those requirements have to be present.

What had happened in the present case produced a very extraordinary state of affairs. The offence of criminal damage of an amount of £23 was in many ways rather less serious than the other offences with which the defendant was charged. Assault on a police constable is more serious in the ordinary way than criminal damage of a small amount. The public order offence may well be more serious. Obstructing a police constable in the course of his duty may well be more serious than criminal damage itself. The result of the magistrates feeling compelled to send this case for trial (compelled by the article in the *Justice of the Peace*) was that the respondent was being sent for trial certainly for no more serious offence than the others with which he was charged, and almost certainly for a rather less serious offence, which was a rather extraordinary result. None of those others was triable other than summarily.

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In my judgment, one of the essentials to comply with s.23(7)(a) is that the offences which are said to be of the same or similar character should have the characteristic, among others, of being triable either way. The words of this subsection follow closely the words of r. 9 of the Indictment Rules, 1971, which are concerned with offences which can be tried on indictment, and one can understand those words being used to enable offences to be tried together on indictment when they are all triable either way. In my opinion, that is one of the characteristics that should apply.

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In my judgment, in this case the magistrates were wrong in the conclusion to which they came, albeit they were misled by the article in the *Justice of the Peace*, and that, in order for s.23(7)(a) to apply, there has to be similarity of fact; there has to be similarity in law; there has to be the characteristic of similarity in that they are all triable either way, and they must form part of a series. In this particular case it is not necessary to decide whether these offences formed part of a series. It is sufficient to say that none of the other characteristics was present and therefore the court was not obliged to consider s.23(7) and the offence of criminal damage remained an offence that was triable only summarily.

Park, J.

PARK J.: I agree.

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Solicitors: *Pellys*, Bishop's Stortford; *Bretherton & Co*, St. Albans.
(for the defendant).

Reported by G.F.L. Bridgman, Esq., Barrister.

R. v. Tottenham JJ.
Ex parte Tibble

QUEEN'S BENCH DIVISION
(Lord Lane, C.J., and Lloyd, J.)
January 30, 1981

R. v. TOTTENHAM JUSTICES. EX PARTE TIBBLE

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Magistrates – Trial of cases – Offences of the same or a similar character – Right to trial on indictment – Criminal Law Act, 1977, s. 23(7).

By s. 20(1) of the Criminal Law Act, 1977, a magistrates' court is to consider whether summary trial of a case or trial on indictment appears to be the more suitable. By s. 23(7), s. 20(1) shall not apply where the offence charged "is one of two or more offences . . . which appear to the court to constitute or form part of a series of two or more offences of the same or a similar character". The defendant can then elect to go for trial.

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The applicant was on bad terms with his neighbour who alleged that he assaulted him and that about half an hour after the assault when the neighbour came from his house with his motor cycle he attacked the cycle with a chopper and damaged it. The applicant, being charged with common assault and criminal damage, wished to elect trial in the Crown Court, contending that the case came within s. 23(7). The justices took the view that that was wrong and the case was adjourned so that an application could be made to the High Court to determine whether or not the justices' decision had been correct.

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Held: it could not be said that the offence of common assault was of a character similar to that of criminal damage; an attack on a person could not be described as similar in law to an attack on property; the justices' decision was right; the applicant's application for judicial review was refused.

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Application by Frederick William Tibble for judicial review of a decision of Tottenham justices.

K. Cameron for the applicant.

S. Mitchell for the justices.

LORD LANE, C.J.: This is an application for judicial review pursuant to leave granted by this court on the 20th May, 1980. The applicant is Frederick William Tibble and he has been charged with criminal damage valued at about £20 under the provisions of the Criminal Damage Act, s. 1. He is also charged with common assault.

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The facts which give rise to those charges are very simple. They happened on the 25th August, 1979. The applicant and the applicant's neighbour did not, it seems, see eye to eye. There had been some dispute or altercation between their respective daughters in which the applicant, no doubt somewhat unwisely, had intervened. That had resulted in the applicant's neighbour accusing the applicant of having struck the neighbour's daughter and during that argument it is said that the applicant assaulted the neighbour himself. That was the common assault. The alleged damage to property happened about half an hour later. The neighbour came out on his motor cycle and he said

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that the applicant attacked the motor cycle with a chopper.

The applicant wished to elect trial at the Crown Court. He appeared at the Tottenham Magistrates' Court on the 14th February, 1980, when the matter fell to be investigated. It was argued on his behalf that the two offences, that of criminal damage and that of common assault, constituted or formed part of a series of two or more offences of the same or similar character, and, consequently, under the terms of the Criminal Law Act, 1977, he was entitled to elect to go for trial if he so wished. The justices came to the view that that submission was wrong. Before they proceeded to deal any further with the matter the case was adjourned so that application could be made to this court to determine whether or not the justices' decision had been correct.

It is apparent from what has been said that once again the attention of this court is being directed to the Criminal Law Act, 1977, ss. 19 to 23. These deal with the procedure to be adopted by justices when considering an information which alleges an offence which is triable either way, that is to say either summarily or upon indictment. Briefly speaking, s. 20 demands that the court should, at the early stages of the trial, decide upon the method for trial. Sections 21 and 22 tell the magistrates how they should proceed according to whether it appears that summary trial or trial on indictment is the more suitable course to be adopted. Section 23 provides an exception. If the offence is one which is set out in sch. 4 to the Criminal Law Act, 1977, the court is required to consider what the value is of the damage done by the charge and to do so before considering any question of the method of trial. If one turns to sch. 4 to the Act one finds that it simply sets out:

1. "Offences under s. 1 of the Criminal Damage Act, 1971 (destroying or damaging property), excluding any offence committed by destroying or damaging property by fire.
2. "The following offences, namely — (a) aiding, abetting, counselling or procuring the commission of any offence mentioned in para. 1 above; (b) attempting to commit any offence so mentioned; and (c) inciting another to commit any offence so mentioned."

If the value involved clearly is below £200 the magistrates, by virtue of s. 23(2) must proceed as if the offence were triable summarily only; if the value involved exceeds £200, and obviously does so, the magistrates must then proceed to consider the appropriate method of trial in accordance with s. 20 and must proceed thereafter in accordance with s. 21 or, as the case may be, s. 22(3). There are further provisions dealing with the question where the amount of the damage is uncertain, that is to say, where it is uncertain whether it was above or below £200 in value.

It is s. 23(7) which causes the difficulty here and has caused difficulty in the past. It reads as follows:

- "Subsection (1) above shall not apply where the offence charged — (a) is one of two or more offences with which the accused is charged on the same occasion and which appear to the court to con-

stitute or form part of a series of two or more offences of the same or a similar character; or (b) consists in the incitement to commit two or more scheduled offences."

R. v. Tottenham JJ.
Ex parte Tibble

Thus where that subsection applies the defendant can elect to go for trial and the magistrates are not under a duty to try the offence summarily as s. 20(1) obliges them to do in other circumstances.

The basis of the submission by counsel for the applicant in the present case that the justices were wrong in their ruling that the applicant was not entitled to elect is a decision of this court, differently constituted, in *R. v. Leicester Justices* (1). It is necessary to set out the facts of that case very briefly. It was a dispute between husband and wife. The first incident was when the husband snatched some keys from his wife's hand as a result of which she suffered injury to her finger. That was laid as an unlawful assault occasioning actual bodily harm. A little later the wife, having armed herself with a duplicate set of car keys, came out of the house whence she had obtained the keys, got into her car, and drove off. The husband was lying in ambush for her down the road, and as she came by he, it was said, threw a milk bottle at the windscreen of the car breaking the windscreen and causing some further injury to the wife. The same problem arose in that case, *mutatis mutandis*, as arose here. What Donaldson, L.J., who delivered the leading judgment in that case, said was this:

"It seems that the clerk to the magistrates took the view that subs. (7), being part of a section which was primarily concerned with criminal damage offences, only applied if the offences referred to were not only committed on the same occasion and formed part of a series of two or more offences of a similar character but were also criminal damage offences. If that was the view taken by the learned clerk, in my judgment, it was wholly wrong. But we have been told by counsel for the applicant here, that there is some misunderstanding by different magistrates' courts up and down the country, or at any rate some difference of understanding, as to what is the meaning and effect of subs. (7). Some magistrates' courts would not, for example, on the facts of this case have regarded these offences as falling within the subsection. Perhaps I could just mention that, in my judgment, the offences charged in this case are offences which form part of a series of two or more offences of the same or a similar character. I apply the tests to be found in *Ludlow v. Metropolitan Police Commissioner* (2) in the context of similar words, albeit occurring under the Indictments Rules, where Lord Pearson, giving the decision of the House of Lords, held that there had to be a nexus between the offences, which there clearly is on the facts of this case, and said that the offences had to be similar both in fact and in law. But in saying that he did not mean, as is clear if one looks at the judgment as a whole, that the offences charged had to be charged under the same section or under the same Act of Parliament."

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(1) (1968) 49 Cr. App. R. 164

(2) 134 JP 277; [1971] AC 21

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If that decision had rested there, the facts being for all intents and purposes indistinguishable from the facts of the present case, there is no doubt that we should have been bound to follow the judgment of the court and to hold that the justices in the present case were wrong and to allow the appeal. Now that further research has been done, it is clear that there were two authorities prior to the decision in the *Leicester Justices* case to neither of which the court in that case had its attention drawn. The first is *In re Prescott* (3) which was a decision of the Court of Appeal consisting of Ormrod, L.J., Brown, L.J., and Eveleigh, L.J. Once again the facts were very similar, if not totally indistinguishable from the present case in essence. The appellant was involved with a police officer and it was said that he had obstructed the police officer in the course of his duty. It is plain that the obstruction took the form of an assault upon the police officer because during the obstruction the police officer's trousers suffered damage to the value of £12. Ormrod, L.J., delivering the leading judgment, after citing extensively from *Ludlow v. Metropolitan Police Commissioner* (2) and dealing with the meaning of the word "series", said:

"When one turns to the nature of the offences charged in this case, one is an offence of obstructing a police officer in the course of his duty and the other is the offence of criminal damage to the officer's trousers. It seems plain beyond any question that the two offences were not of the same or similar character, nor can I see on the facts of this case how these two offences could possibly be described as a 'series'. There is no series."

In the present case we are not concerned with the meaning of the word "series", but the learned Lord Justice, in saying what he did was in agreement with his two brethren. It is very difficult to see what distinction can properly be drawn between the facts of that case and the facts of the *Leicester Justices* case (1) and indeed those of the present case. That decision was given on 12th June, 1980.

On the 22nd May, 1980, *R. v. Hatfield Justices, Ex parte Inspector Douglas Castle* (4) came before this court, differently constituted. The defendant was charged with committing four offences on the same day. The first three offences were using threatening words and behaviour likely to occasion a breach of the peace, assaulting a police officer in the execution of his duty, and wilfully obstructing a police constable. Those offences were triable summarily only. The fourth offence, that of damaging a police uniform contrary to s. 1(1) of the Criminal Damage Act, 1971, was triable either summarily or on indictment. There, not only was there an offence of criminal damage but there was an offence of assault. A number of matters were considered by the court and one of them was the question whether there had been a series of offences or not. With that we are not concerned, but the

(1) (1968) 49 Cr. App. R. 164

(2) 134 J.P. 277; [1971] AC 21

(3) 70 Cr. App. R. 244

(4) ante p. 265

CASES REPORTED TO JUNE 30, 1981

ARSON — See Criminal Law

ASSAULT — See Criminal Law

BAIL — Crown Court — Jurisdiction — Application to Crown Court after refusal of application by High Court — Courts Act, 1971, s. 13(4).
R. v. Reading Crown Court, Ex Parte Malik QBD 132

BREATH TEST — See Road Traffic

CASE STATED — See Magistrates

CAUSING DEATH BY RECKLESS DRIVING — See Road Traffic

CHILD — Care — Assumption by local authority of parental rights and duties — Parent consistently failing to discharge obligations of parent — Children Act, 1948, s.2 as substituted by s. 57 of Children Act 1975.
W. v. Sunderland Borough Council Fam. Div. 117

CHILD — Care — Committal into care of local authority — Appeal by parents to Crown Court — Competency — Children and Young Persons Act, 1969, s. 1, s. 2(12).
Bishop v. Gloucestershire County Council QBD 141

CHILD — Care — Resolution by local authority — Objection by mother — Hearing by justices — Social officer seen by justices in private — Disputable evidence to be given by social officer.
W. v. Sunderland Borough Council Fam. Div. 117

CHILD — Care — Voluntary committal to care of local authority — Ward of court — Duty of local authority — Welfare of child paramount consideration — Decision by court of all serious issues relating to child — Need for approval of court to major change in child's way of life.
R. v. C.B. CA 90

CHILD — Neglect — Unnecessary suffering or injury to health — Charge of offence by parents — Proper direction to jury — Children and Young Persons Act, 1983, s. 1(1).
R. v. Sheppard HL 65

CHILD STEALING — See Criminal Law

CRIMINAL LAW — Arson — Defence — Self-induced drunkenness — Criminal Damage Act, 1971, s. 1(1), s. 1(2).
R. v. Caldwell HL 211

CRIMINAL LAW — Assault — Defence — Self-defence — Honest but mistaken belief that action justified — Need for reasonable grounds for belief.
Albert v. Lavin QBD 184



principal matter with which we are concerned was dealt with by Waller, L.J., as follows:

"Counsel on behalf of the applicant submits to this court that the offences here were neither of a similar character nor did they constitute a "part of a series". They all occurred, submits counsel, at virtually the same time. They all occurred in relation to the same officer and therefore they were not part of a series. The time probably was not more than a minute or two. Secondly, they were not offences of a similar character. Threatening words and behaviour whereby a breach of the peace is likely to be occasioned, contrary to s. 5 of the Public Order Act, has nothing in common with criminal damage. Assailing a constable has nothing in common with criminal damage except that the damage was to a constable's uniform, but criminal damage may be done to anything. Criminal damage has nothing in common with wilful obstruction of a constable in the execution of his duty."

That decision is, of course, binding upon us and it seems to us it is in total accord with the decision in *Re Prescott* (3) to which I have already referred. It is to be noted that the decision in the *Leicester Justices* (1) was on the 12th June, 1980, which was about three weeks after the *Hatfield Justices* case (4) and I repeat that neither *Re Prescott* nor *R. v. Hatfield Justices* were cited to the Divisional Court in the *Leicester Justices* case. As a matter simply of precedent, it seems to me that we are obliged to follow *Re Prescott* and *R. v. Hatfield* and to say, respectfully, that we are not in a position to follow *Leicester Justices* even had we been inclined to do so. The result is this. It cannot be said, in my judgment, that the offence of common assault is of a similar character to the offence of criminal damage.

One turns now to examine the House of Lords' decision in *Ludlow v. Metropolitan Police Commissioner*. (2). That case involved an examination of r. 3 of sch. 1 to the Indictment Act, 1915, which reads as follows:

"Charges for any offences . . . may be joined in the same indictment if those charges . . . form or are a part of a series of offences of the same or a similar character."

The circumstances of the case were that the appellant there, in August, 1968, had been seen emerging from the window of a public house where he had been attempting to steal. In September of the same year, in another public house in the same area, he ordered a round of drinks, refused to pay, and then handed over a 10/- note saying he would pay for his own drink. In due course he had an altercation with the barman, punched the barman, and snatched the note back from him. He was charged on one indictment with larceny, that was the August event, and on the second charge with robbery with violence, that was in

(1) (1968) 49 Cr. App. R. 164

(2) 134 J.P. 277; [1971] A.C. 21

(3) 70 Cr. App. R. 244

(4) ante, p. 265

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respect of the events in September. An application for separate trials of those two charges was refused. He was convicted of both. He appealed and in due course their Lordships had to consider whether that refusal to sever was correct. It was held that it was. The two charges could properly be joined in that the two offences, since they had been committed in neighbouring public houses within a matter of a few days of each other, could be described properly as a series and were of a similar character.

In that case it is apparent that one side was arguing that similarity had to be similarity of fact and the other side was arguing that similarity had to be similarity of law. What Lord Pearson, in the leading speech, had to say about that was as follows:

"A number of passages in the judgments were cited, and I think the proper conclusion to be drawn from the judgments as a whole is that both the law and the facts have been and should be taken into account in deciding whether offences are similar or dissimilar in character."

Applying that as it stands to the circumstances of the present case, there is, no doubt, a good deal to be said for the proposition that so far as the facts are concerned there was a similarity. The applicant here in one event was taking it out on the owner of the motor cycle and on the other charge was taking it out on the motor cycle, if one may put it in that way, but so far as the law is concerned I find it, quite apart from the decisions in *R. v. Hatfield Justices* (4) and *Re Prescott* (3), impossible to say that an attack on a person can be described as similar in law to an attack upon property.

There is another aspect to the *Ludlow* case (2) apart from the one with which I have just dealt and that is to be found at p. 40 of the report:

"Another point, dealt with in the Court of Appeal's judgment in the *Kray* case (5) is relevant for the present case also. They said: 'It is not desirable, in the view of this court, that r. 3 should be given an unduly restricted meaning, since any risk of injustice can be avoided by the exercise of the judge's discretion to sever the indictment. All that is necessary to satisfy the rule is that the offences should exhibit such similar features as to establish a *prima facie* case that they can properly and conveniently be tried together.'

Then Lord Pearson says this:

"That last sentence is not a construction of the rule, but I think it is helpful practical advice for those applying the rule. The view

(2) 124 JP 277; [1971] AC 21

(3) 70 Cr. App. R 244

(4) ante, p. 265

(5) 133 JP 719; [1970] 1 QB 125

that r. 3 should not be given an unduly restricted meaning derives support from authority".

He then sets out other cases.

So much for that aspect of the decision in *Ludlow* (1), but I do not think that it is proper uncritically to import that part of the reasoning from the *Ludlow* case (2) which was based upon the Indictments Act, 1915, into a consideration of the meaning of s.23(7) of the Criminal Law Act, 1977, although the words used in each of the two Acts are similar. The object of each of the two provisions is different. The court was enabled to hear, at one and the same time, a number of charges which, put very broadly, had common features that made a joint trial of the various charges at the same time desirable in a way which was fair to the defendant himself. Moreover, there was the safeguard in those cases that, if a joinder had been wrong or if it appeared at a later stage that it was likely to cause unfairness to the defendant, the judge at trial could always accede to an application to sever. It seems to me that for those reasons the interpretation given to the words in the Indictment Act can permissibly be a great deal wider than the interpretation which must be given to the words of the Criminal Law Act, 1977, because the object of s.23 seems to me to be different. It is apparently to allow the defendant to be tried on indictment if he wishes where, although the criminal damage charge is a very minor one, there are other charges which may make a minor matter more serious and s.23(7) in those circumstances allows a defendant on the one hand or the prosecutor on the other in the appropriate case to elect to have the matter tried by the Crown Court rather than by the justices. For those reasons, quite apart from the question of precedent, it seems to me that the decisions in *R. v. Hatfield* (4) and *Re Prescott* (3) are to be preferred to the decision of this court in the *Leicester Justices* case (1).

One does not know whether there are other offences which, in law, are similar to the Criminal Damage Act, s.1, offences apart from other offences under that section. It is not for us to embark upon an enquiry as to that. There is no doubt that, generally speaking, similar offences will be other offences under that section, but there may be others of which we have at the moment no knowledge. Suffice it to say that so far as I am concerned the answer to the problem facing us is that an offence against property of this sort, damaging property, is not of a similar character to an offence involving an assault on a human being.

Various other ancillary matters have been raised before this court. It is right to say that our attention was drawn to the second part of the judgment of the court in *R. v. Hatfield Justices* (4). I read

(1) (1968) 49 Cr. App. R 164

(2) 134 JP 277; [1971] AC 21

(3) 70 Cr. App. R 244

(4) ante, p. 265

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the headnote in the All England Reports which has already been cited in order to set out what that second half was. It reads as follows:

"For s.23(7)(a) of the 1977 Act to apply the offence charged and the other offences with which the accused was charged on the same occasion have to be part of a series and similar in fact and law and has further to be similar in being offences which were triable either way, that is summarily or on indictment. Since the offence of criminal damage and the other offences charged did not have those similar characteristics, it followed that s.23(7)(a) was not applicable and under s.23(1) and (2) the criminal damage offence was required to be tried summarily."

We have been asked to comment on the decision there that the offences in order to be similar had, among other things, all to be triable either way. It is not part of our duty, indeed it would be impertinent for us to say whether in our view that is right or wrong. That is how the law stands at the moment and that is the end of that matter.

The other difficulty which was raised by counsel for the respondent was this. He posed a situation where, for example, a man is charged before justices with two different crimes, the first example was attempting to obtain property by deception by means of a false insurance claim saying that the damage in respect of which he was claiming was accidental whereas in fact it was purposeful, and the second charge being one related to that damage under the Criminal Damage Act. Counsel asks, rhetorically, whether it would be proper or sensible for those two matters to be tried by separate courts. He suggests that, if the strict test of similarity, which I have said I think to be correct, is applied then, necessarily, the obtaining property by deception will be tried at the Crown Court whereas the criminal damage will be left to be tried by the justices. No doubt there may be such anomalies which will arise from the way in which I suggest this matter should be treated, though perhaps not quite so difficult to overcome as the learned counsel would have us believe. They are there and must be borne with such fortitude as people can muster.

For the reasons which I have endeavoured to explain, in my judgment this application must be refused. The justices were right in the conclusion which they arrived at.

LLOYD, J: I agree and have nothing to add.

Solicitors: *Shepherd, Harris & Co.; L.A.C. Pratt.*

Reported by G. F. L. Bridgman, Esq., Barrister.

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QUEEN'S BENCH DIVISION
(Donaldson, L.J., and Kilner Brown, J.)
July 2, 1980

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Crown Court
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R. v. ST ALBANS CROWN COURT. EX PARTE CINNAMOND

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Crown Court — Sentence — Control by High Court — Harsh and oppressive sentence.

The applicant was convicted by magistrates of two motoring offences. The Crown Court allowed an appeal by him regarding the first charge. As regards the second charge his appeal against his conviction of driving without due care and attention was dismissed and the Crown Court substituted for a sentence of three months' disqualification a sentence of 18 months' disqualification with three months' disqualification under the "totting up" provisions. The applicant applied for a judicial review to quash the decision of the Crown Court on the ground that it erred in law in imposing the sentence, or, alternatively, that it exceeded its jurisdiction.

Held: the Divisional Court was empowered to intervene in relation to a sentence of imprisonment imposed by the Crown Court, or any other sentence where it was satisfied not only that the sentence was severe, even unduly severe, but that it was, in the words of Lord Clyde in the Scottish case of *Fleming v. MacDonald* (1958 JC 1), harsh and oppressive, or so far outside the normal discretionary limits as to enable the Divisional Court to say that its imposition must involve an error of law, even though it might not be apparent what was the precise nature of that error; in the present case the Crown Court had gone considerably beyond the range of penalties which were composed up and down the country in cases of careless driving.

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Application by Kevin Patrick Cinnamond for Judicial Review of a decision of St Albans Crown Court on October 17, 1979.

N. Fricker and S. Martin for the applicant.
The respondent did not appear.

DONALDSON, L.J.: In this case the applicant applies for judicial review to quash a decision of the Crown Court at St Albans given on 17th October, 1979. He was convicted before the Watford magistrates on 1st May, 1979, of two motoring offences. The first was driving with excess alcohol for which he was fined £150, his licence was endorsed, and he was disqualified for 18 months and for a further three months under the totting-up provisions. The second charge on which he was convicted was driving without due care and attention. As far as that was concerned, he was fined £50, his licence was endorsed and a three months' disqualification was imposed under the totting-up provisions, those disqualifications being consecutive. The facts were that he had driven his car, a Mercedes, along the north orbital road at Garston in Hertfordshire. No other vehicle was involved, but his car left the road and hit a lamp post on the central reservation. He had been breathalysed with a positive reaction. He had then given a sample of blood and on analysis it had emerged that he had 172 mg of alcohol per 100 ml of blood, in other words over twice the permitted limit. His defence, so far as the alcohol offence was concerned, was, first that he was not the driver of the car, and secondly that his arrest had been unlawful because the medical practitioner in whose charge

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he was on admission to hospital had not been notified that the police wished him to undertake a breath test.

He appealed against both convictions and the Crown Court allowed the appeal against the first charge, that relating to driving with excessive alcohol, not on the ground that he was not the driver but on the ground that the requirements of s.8(2) of the Road Traffic Act, 1972, in relation to the medical practitioner had not been satisfied. As counsel on his behalf very fairly said, it was a technical defence, but it was a good defence and it succeeded. So far as the second charge was concerned, driving without due care and attention, the appeal against conviction was dismissed. The Crown Court then proceeded to consider the sentence in relation to driving without due care and attention. They substituted for that sentence (of three months' disqualification) a sentence of 18 months' disqualification together with three months' disqualification under the totting-up provisions. They also ordered him to pay the costs of both appeals so that, in effect, whereas when he was before the magistrates he was sentenced to two years' disqualification, he was now faced with 21 months' disqualification but the whole of that 21 months was attributed to the driving without due care and attention, whereas the magistrates had said that that offence only attracted three months' disqualification under the totting-up procedure. The basis on which the application is made to this court is that the Crown Court erred in law in imposing that sentence or, alternatively, it exceeded its jurisdiction.

Let it be said straight away that, so far as is known, this is the first case in which in England a sentence by a Crown Court has been challenged in this court in circumstances such as these. When I say 'circumstances such as these' I mean in circumstances in which there is no doubt that the sentence imposed by the Crown Court was within the limits permitted in terms by the statute. I say that because there is a power to disqualify in relation to careless driving and there is no limitation on the period which can be imposed. In terms of the statutory jurisdiction there could have been a disqualification here for life, but of course that did not happen.

The question arises: What is the jurisdiction which this court is being invited to exercise if it is not that the Crown Court has no jurisdiction in the strict sense which I have indicated?

Counsel for the applicant has been of the greatest possible assistance to us in exploring what our jurisdiction is. The starting point is, I think, the power of the Crown Court to state a Case under s.10 of the Courts Act, 1971, in respect of any judgment or order of that court other than a judgment or order relating to a trial on indictment and also other than certain orders made under statutes which are immaterial. The power of that court to state a Case for the opinion of this court is in response to an application which is made on the ground that the decision of the Crown Court is wrong in law or is in excess of jurisdiction. When this matter came before the Divisional Court previously, on the application for leave, it was indicated to the applicant that he should proceed by judicial review rather than Case Stated, which would have been the alternative procedure, in order to minimise the delay and bearing in mind the fact that his disqualification had been imposed in

October, 1979, and had not been suspended. I treat this as if it could equally well have come before the court by Case Stated. That then raises the question of what is meant by 'wrong in law' or 'in excess of jurisdiction'. In relation to excess of jurisdiction, is this court confined to the exercise of looking to the statute in any particular case and seeing whether the sentence is in excess of that which the statute permits?

Here again we have had great help from counsel for the applicant because he has referred us to a Scottish case, *Fleming v. Macdonald* (1). It appears that in Scotland, where there is an appeal by Case Stated under the Summary Jurisdiction (Scotland) Act, 1954, in relation to the imposition of a sentence of imprisonment or indeed any other sentence, the court will intervene if it is satisfied not only that the sentence is wrong but that it is, to use the words used by the judges in that case, 'harsh and oppressive'. If authority is needed for that proposition, it is to be found in *Fleming v. Macdonald* (1) per Lord Justice-General (Lord Clyde).

For my part, I think that this court is empowered to exercise a similar jurisdiction, probably subject to rather similar restrictions, namely, that it is not sufficient to decide that the sentence is severe, perhaps even unduly severe or surprisingly severe. It is necessary to decide that it is either harsh and oppressive or, if those adjectives are thought to be unfortunate or in any way offensive, that it is so far outside the normal discretionary limits as to enable this court to say that its imposition must involve an error of law of some description, even if it may not be apparent at once what is the precise nature of that error.

It seems to me that the jurisdiction which this court is empowered to exercise in this field can be considered analogous to the jurisdiction which it exercised in relation to the Crown and government departments where, on the tests in *Associated Provincial Picture Houses Ltd v. Wednesbury Corp*n (2), it examines a decision and says that no reasonable authority could have reached this decision without a self-misdirection of some sort and therefore is satisfied that there has been some such misdirection.

I turn, against that background, to consider the position which has arisen in this case. Of course the applicant is aggrieved at having appealed and ended up worse than when he started, or almost worse than when he started, because while it is true that his disqualification period was reduced by three months he had to pay all the costs of the appeal, including that part of the appeal in respect of which he was successful. But that is not as such a ground for intervening.

What is said by counsel for the applicant, however, is this. While he accepts that the Crown Court was fully entitled to take account of the fact that he had been drinking to the extent that had been proved by the evidence and that this was an aggravating factor in the careless driving case, while it was fully entitled to take account of his previous record, which was bad (he had been convicted in August 1975 on a

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(1) 1958 JC 1

(2) 112 JP 55; [1948] 1 KB 223

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drunk-in-charge count when he had been disqualified for 12 months and fined £250, and since then he had had a very minor case of speeding), while it could take account of all those matters, still on a charge of careless driving, as contrasted with reckless driving, to impose a disqualification of as long as 18 months meant that the Crown Court was going very considerably beyond the range of penalties which are imposed up and down the country in the case of careless driving.

In support of that proposition he drew attention to the suggestions published in April 1975 by the Magistrates' Association which have received the approval of Lord Widgery CJ and Lord Elwyn-Jones LC, and are set out in Appendix III to Wilkinson's Road Traffic Offences (9th edn, 1977, pp.881-885) and which suggest that perhaps for an average case of careless driving there would be endorsement but no disqualification at all. This is very far from being the average case of careless driving, bearing in mind the applicant's record. Disqualification was well merited, but 18 months' disqualification, particularly in the circumstances in which he succeeded in obtaining the quashing of a conviction in respect of which that very period of disqualification had been imposed, and quite rightly imposed, seems to me to involve so great a disparity with the normal range as to constitute an error of law, if not an excess of jurisdiction.

I would, therefore, quash this determination by the Crown Court, but I would go on to exercise the power which lies in this court under s.16 of the Administration of Justice Act 1960 to vary a sentence on certiorari, and I would substitute a disqualification of six months for the careless driving, together with an additional and consecutive disqualification of three months under the totting-up provisions.

KILNER BROWN, J.: I agree.

Application granted.

Solicitors: Penman, Johnson & Ewins, Watford.

Reported by G.F.L. Bridgman, Esq., Barrister.

COURT OF APPEAL
(Lord Lane, C.J., Boreham, J., and Gibson, J.)
July 14, 1980

A-G's Ref.
No. 4 of 1979

Court of Appeal

ATTORNEY-GENERAL'S REFERENCE NO. 4 OF 1979

Criminal Law – Handling stolen goods – Payment out of bank account constituted by mixture of money amounting to stolen goods and money not so tainted – Inference that payment represented stolen goods from intention of receiver – Theft Act, 1968, s.22, s.24.

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In 1976 and 1977 a fellow employee of the respondent obtained by deception from their employer certain cheques which she paid into her bank account; during the same period she also paid into her account other cheques which she had lawfully received from her employer on a date when she handed to the respondent a cheque for £288, she had a credit balance of £641 which was exceeded by the total amount lawfully received. The total of the sums dishonestly obtained by the thief and paid into her account was £859. The respondent was charged with having dishonestly received the cheque for £288 knowing or believing it to be stolen goods. There was evidence that when she was asked whether the £288 was "her share" she replied: "I suppose it was". At the end of the case for the prosecution the judge ruled that there was no evidence that the cheque given to the respondent was in law stolen goods and directed the jury to acquit her. On a reference by the Attorney-General,

Held: it was clear from the extended definition of goods in s.4(1) and s.34(2) of the Theft Act, 1968, that a cheque obtained by deception constituted stolen goods for the purposes of ss.22 and 24 of the Act, and that a balance in a bank account, being a debt, was itself a thing in action which fell within the definition of goods and might therefore be goods which directly or indirectly represented stolen goods for the purposes of s.24(2)(a), and that where a person obtained cheques by deception and paid them into his banking account the balance in that account might, to the value of the tainted cheques, be goods which directly represented the stolen goods in the hands of a handler as being the proceeds of any disposal or realisation of the goods stolen within s.24(2)(a); but, if the prosecution was to prove dishonest handling by receiving, it was necessary to establish that what the handler received was in fact the whole or part of the stolen goods within the meaning of s.24(2)(a) of the Act, where a payment was made out of a fund constituted by a mixture of money amounting to stolen goods within the meaning of s.24 of the Act and money not so tainted, or of a bank account similarly constituted, in such a way that the specific origin of the sum paid could not be identified with either portion of the fund a jury was not entitled to infer that the payment represented stolen goods within the meaning of s.24(2) of the Act from the intention of the receiver that it should represent the stolen goods or a share thereof.

Reference by Attorney-General under s.36 of the Criminal Justice Act, 1972.

*A J D Nicholl for the Attorney-General.
Malcolm Lee for the respondent.*

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July 14, 1980. LORD LANE, C.J., read the following judgment of the court: This reference by the Attorney-General arises out of a case in

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which the respondent ('the accused') was indicted on one count which alleged that she dishonestly received certain stolen goods, namely a cheque for £288.53, knowing or believing the same to be stolen goods.

After a submission on behalf of the accused at the end of the prosecution case, the trial judge directed the jury to acquit. There was no issue as to the receipt by the accused of the cheque, nor was it in dispute that the person who paid the cheque had previously obtained sums of money by dishonest deception, but the judge ruled that there was no evidence that the cheque so paid to the accused was in law stolen goods.

The facts of the case were these. Over a period of six months in 1976 and 1977, a fellow employee of the accused obtained by deception from their employer certain cheques. It is convenient, for brief reference, to refer to that fellow employee as 'the thief'. The thief paid those fraudulently obtained cheques into her bank account. During the same period the thief also paid into her bank account other cheques which she had lawfully received from her employer and which represented, first, amounts earned by and due to fellow employees which she was required to pay to those employees, and, secondly, sums lawfully earned by the thief. The total of the sums paid into the bank account by the thief as sums dishonestly obtained by deception from the employer was £859. The thief had duly paid out to the other employees the amounts she had received for such payments. On the date when the thief handed to the accused a cheque for £288.53, the state of the thief's bank account was a credit balance of £641.32. The total amount lawfully received into the account by the thief for payment to other employees, which had been paid out to them, exceeded that balance of £641.32. The total amount lawfully received by the thief in respect of her own earnings and paid into the account had also exceeded £641.32. The court has no information as to the nature or purpose of other disbursements made from the account by the thief and assumes that there was no evidence.

There was evidence that the accused had admitted that she knew of the obtaining by deception of the £859 by the thief. It is said that there was evidence from which it would have been open to the jury to conclude that, for the continued deceptions of the thief to succeed, the co-operation or at least acquiescence, of the accused was necessary. Whatever the reason it was thought more appropriate to charge her with handling than with obtaining by deception. The accused was asked about the cheque paid to her by the thief. One question asked of her was this: 'Was that your share?' She replied: 'I suppose it was.' She added, according to the evidence which the jury was invited to consider: 'I suppose you could call it guilt but I haven't touched it.'

The judge at the trial was invited to rule that there was no evidence on which the jury could conclude that the cheque given to the accused by the thief amounted in law to stolen goods within the meaning of the Theft Act, 1968. Two points were taken on behalf of the accused by counsel. First, that the offence of handling stolen goods could not be committed with reference to a stolen thing in action, or to a thing in action representing stolen goods, and, secondly, that on the evidence before the court the offence of handling stolen goods could not be

proved. As to the first point, the judge rejected the submission. As to the second, the judge ruled that, since the thief's bank account had been fed by payments in the three categories described above, namely (i) sums lawfully obtained for payment to other employees, (ii) sums lawfully obtained as being money earned by the thief, and (iii) the £859.70 dishonestly obtained by deception, it was impossible for the prosecution to prove that the payment made to the accused was in law stolen goods. In reaching his conclusion the judge said this:

'I have to consider whether or not the cheque which the thief paid to the accused's account indirectly represents the stolen goods in the hands of the thief. It is very tempting to say that, if the drawer of the cheque and the recipient of the cheque intend that the money represented by the cheque shall represent that part of the choses in action owed by the bank to the account holder which is stolen money that is sufficient for these purposes. But in my view the [1968] Act does not say that. It does not imply it and I consider that, as I have to construe this part and every part of the Act strictly, if Parliament had intended to provide for such a case it would have said so.'

It is from this conclusion on the second point that the point of law referred to this court arises. The point of law referred to us under s.36(1) of the Criminal Justice Act, 1972, is as follows:

'Where a payment is made out of a fund constituted by a mixture of money amounting to stolen goods within the meaning of s.24 of the Theft Act, 1968, and money not so tainted, or of a bank account similarly constituted, in such a way that the specific origin of the sum paid cannot be identified with either portion of the fund, is a jury entitled to infer that the payment represented stolen goods within the meaning of s.24(2) of the Act, from the intention of the parties that it should represent the stolen goods or a share thereof?'

Before dealing with the substance of the question as it arose in the instant case as a point of law, it is necessary to emphasise that the power given to the Attorney-General to refer to a point of law to this court is a power to refer a point of law which actually arose in a real case. There is no power to refer theoretical questions of law, however interesting or difficult. As was said in this court by James, L.J., in *Attorney-General's Reference (No 2 of 1975)(1)*:

'A reference of a point of law under s.36 of the 1972 Act is not a reference in the abstract but is in relation to the case in which the point has arisen.'

The point of law as referred begins with reference to a fund constituted by a mixture of money. The question continues with reference to a bank account constituted by a mixture of money. The court will deal with that part of the question, although we do not suggest that a

(1) [1976] 2 All ER 753; [1976] 1 WLR 710

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mixed fund of money in specie would necessarily require to be treated in any different manner. The point of law as stated also refers to the fact that the bank account of the thief in this case had been fed with money of the three types stated — sums honestly received for onward payment to other employees; sums honestly received by and for the thief herself; and stolen money, i.e. the proceeds of cheques obtained by fraud. At the time of payment of the cheque for £288.53 to the accused, that sum could not be objectively identified as coming from any one of the three types of money. So much is obvious from the nature of a bank account in which the balance is stated, for the purposes of the banker and of the customer, as the sum of the various credits and debits. At the trial, the attitude of the prosecution was, as stated by the judge, that it was impossible to say what part of the money in the thief's account represented stolen goods, and the prosecution therefore submitted that the intention of the parties, i.e. of the paying thief and of the receiver of the payment, must be looked at as at the time when the money passed. The question referred to us assumes, in conformity with that attitude, that, apart from proof of what any party to the payment *said* about her intention at the time of payment, it was impossible to demonstrate that the balance in the account at the time of payment, or the particular payment made, was to be regarded, for the purposes of the prosecution, as having originated from any particular type of money in the account.

The submissions which have been made can be summarised as follows. Counsel for the accused, who has appeared to support the ruling made by the judge, has submitted that the offence of handling cannot be committed with reference to a thing in action, at least so far as concerns handling by receiving. He made it clear that this was not the main point of his argument and he did no more than raise the point for the court's consideration. He referred us to passages in Smith on the Law of Theft (4th edn.) and in Smith and Hogan on Criminal Law (4th edn.) in which the point was discussed. The main submission developed by counsel for the accused was that, where a bank account was made up of a mixture of credit, some lawfully obtained and some dishonestly obtained, as in this case, the receipt of a payment or part of that mixed fund cannot be demonstrated as being in law the receipt of stolen goods. Once the identity of the dishonestly obtained, or stolen, money is destroyed by mixing in the account with untainted money, that identity as stolen money cannot be subsequently revived by any evincing or proof of intention on the part of the holder of the account or of the recipient of a payment. This conclusion was, said counsel, a consequence in law of the nature of money.

Counsel on behalf of the Attorney-General on the reference has submitted that a chose in action was capable of being stolen goods within the meaning of s.24(2) of the 1968 Act, i.e. as

'other goods which directly or indirectly represent . . . the stolen goods in the hands of the thief as being the proceeds of any disposal or realisation . . . of the goods stolen . . .'

Next, he submitted that the receipt of a payment out of a mixed bank account, like that of the thief in this case, could be proved by admissible

JUVENILE COURT — See Magistrates

LEGAL AID — Refusal by justices — Appeal — Need to show that justices' decision unreasonable.				
R. v. Greater Manchester Justices, Ex Parte Horsley	...	...	...	QBD 19
LICENSING — Offence — Sale of intoxicating liquor without licence — Sale to non-members of club — Sale by barman servant of committee — Liability of members of committee — Licensing Act, 1964, s. 160(1).				
Anderton v. Rodgers	...	...	...	QBD 181
LOCAL AUTHORITY — Order — Infringement — Need to prove knowledge by defendant of existence of order — Tree preservation order — Town and Country Planning Act, 1971, s. 102(1).				
Maidstone Borough Council v. Mortimer	...	...	...	QBD 45
MAGISTRATES — Case stated — Application for — Identification of questions raised in case — Effect of omission — Magistrates' Courts Act, 1952, s. 87 — Magistrates' Courts Rules, 1968, as amended by the Magistrates' Courts Amendment (No. 2) Rules, 1975, r. 65.				
R. v. Croydon Justices, Ex Parte Lefore Holdings Ltd	...	...	...	CA 151
MAGISTRATES — Evidence — Use of gauge in private room to test tread on motor vehicle tyres — Magistrates acting as their own expert evidence — Need to hear case in open court.				
R. v. Tiverton Justices, Ex Parte Smith	...	...	...	QBD 177
MAGISTRATES — Information — Need to be laid before magistrates — Consideration of information — Responsibility of magistrates — Essential contents of information — No delegation of judicial function.				
R. v. Birmingham Justices, Ex parte D.W. Parkin Construction Ltd				
R. v. Gateshead Justices, Ex Parte Tesco Stores Ltd	...	...	...	QBD 200
MAGISTRATES — Juvenile court — Defendant aged 16 when charged and pleading — Defendant becoming 17 before date of hearing of case — Children and Young Persons Act, 1969, s. 6 — Criminal Law Act, 1977, s. 19(1).				
R. v. St. Albans Juvenile Court, Ex Parte Godman	...	...	...	QBD 137
MAGISTRATES — Juvenile court — Defendant 16 when charged and remanded — Defendant becoming 17 before hearing of case — Age fixed when defendant first appears or is brought before court in connexion with offence charged — Children and Young Persons Act, 1963, s. 29(1), as amended by Children and Young Persons Act, 1969.				
R. v. Amersham Juvenile Court, Ex Parte Wilson	...	...	...	QBD 240
MAGISTRATES — Recognizances — Binding over to keep the peace — Refusal by defendant to acknowledge himself bound — Powers of magistrate — Magistrates' Courts Act, 1952, s. 91.				
Veater v. Glennon	...	...	...	QBD 158
MAGISTRATES — Res judicata — Dismissal of prosecution in absence of witnesses — Fresh information preferred.				
R. v. Swansea Justices, Ex Parte Purvis	...	...	...	QBD 252
MAGISTRATES — Retirement of clerk with magistrates — Need to avoid appearance that clerk taking part in decision on fact — Advice on standard of proof of offence.				
R. v. Guildford Justices, Ex Parte Harding	...	...	...	QBD 174

MAGISTRATES — Sentence — Imprisonment — Consecutive terms — Separate periods for non-payment of separate fines — Magistrates' Courts Act, 1952, s. 64(1)(3), s. 65(2), sched. 3.						
R. v. Southampton Justices, Ex parte Davies	...	...	...	...	QBD	247
NATIONAL ASSISTANCE — Accommodation for persons in need of care and attention — Charges for accommodation — Provision of accommodation by voluntary organization — Payment of charges by local authority — Reimbursement by person for whom accommodation provided — National Assistance Act, s. 26(3).						
Dorset County Council v. Greenham	...	...	...	...	QBD	125
OBSCENE PUBLICATION — Obscene display of images on screen — Images derived from video tape — Obscene Publications Act, 1959, s. 1(2), (3). Attorney-General's Reference (No. 5 of 1980)	...	...	...	...	CA	110
PRISON — Discipline — Adjudication by board of visitors — Proceedings by prisoner alleging adjudication null and void — Action for declaration — Judicial review — R.S.C., Order 53, r. 1.						
Heywood v. Hull Prison Board of Visitors	...	...	...	...	Ch. Div.	25
ROAD TRAFFIC — Breath test — Accident — Driver deliberately driving into gate . . . Road Traffic Act, 1972, s. 8(2).						
Chief Constable of Staffordshire v. Lees	...	...	...	...	QBD	208
ROAD TRAFFIC — Breath test — Refusal — Arrest of person driving — Arrest by police officer on private property of driver — Validity — Road Traffic Act, 1972, s. 8(5).						
Lambert v. Roberts	...	...	...	...	QBD	256
ROAD TRAFFIC — Causing death by reckless driving — "Reckless" — Direction to jury — Road Traffic Act, 1972, as substituted by s. 50(1) of the Criminal Law Act, 1977.						
R. v. Lawrence	...	...	...	...	HL	227





evidence to constitute the receipt of stolen goods if it could thereby be shown that the intention of the thief, in making payment out of the mixed fund, was to pay to the receiver all or part of that part of the mixed fund which represented the stolen goods in the hands of the thief. Counsel for the Attorney-General contended that the matter should be approached by examining, first, whether, on the evidence of the payments in and out of the account, it was possible that, as at the date of the payment in question, that payment could constitute part of the mixed fund which represented the stolen goods. If that is shown to be possible (he argued as at the date that the cheque is drawn) then, according to his submission, it is necessary to consider whether by admissible evidence it is demonstrated that the thief, in paying the money, intended the payment to be part of the mixed fund which represented the stolen goods. If a *prima facie* case to that effect is made out the jury must be allowed to consider the whole case, and, if they think right, to reach the conclusion that the payment received represented stolen goods within the meaning of s.24(2) of the 1968 Act. If they could reach that conclusion, of course, the jury would have to consider the other essential issues whether the defendant knew or believed the payment to represent stolen goods and whether she received the payment dishonestly. Perhaps because it was thought that admissible and effective evidence of the intention of the thief in making any such payment might rarely be available, counsel contended that the rules of common law and equity, which relate to the principle of trading property, and the rules of equity relating to the right of a beneficiary under a trust to trace trust assets which have passed through the bank account of a trustee to a volunteer were of assistance to his submissions. He said that the 1968 Act was enacted by reference to and against the background of the general law of property, that the rules of common law and equity which relate to tracing and restitution supported the general argument that the nature of a payment out of a mixed fund could be determined by reference to the intention of the payer, and that a jury should be directed in such a case as this to consider those rules of law and equity and have regard to them in deciding whether the money paid out of the mixed fund bank account by the thief was proved to have been part of the money dishonestly obtained by the thief. Reference was made to a number of cases.

We can begin the statement of our opinion on the point of law referred to us by observing that the cheque which the accused was alleged to have received was, plainly, not part of the goods originally stolen or obtained. In order to succeed, therefore, the prosecution had to bring the case within the terms of s.24(2) of the 1968 Act, which defines the scope of offences relating to the handling of stolen goods. The relevant provisions of s.24(2) read as follows:

'references to stolen goods shall include . . . (a) any other goods which directly or indirectly represent or have at any time represented the stolen goods in the hands of the thief as being the proceeds of any disposal or realisation of the whole or part of the goods stolen . . .'

By s.24(4) the reference to 'goods which have been stolen' includes goods which have been obtained by deception.

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It was submitted that the language of s.24(2)(a) afforded some support for the first point made on behalf of the accused, namely, that a thing in action cannot be handled by receiving within s.22 of the 1968 Act. By s.34(2)(b), however, the interpretation section of this Act, "goods", except in so far as the context otherwise requires, includes money and every other description of property except land, and includes things severed from the land . . . Further, by the combined effect of ss.4(1) and 34(2), "Property" includes money and all other property, real or personal, including things in action . . .

In our judgment therefore it is clear from that extended definition of 'goods' that a cheque obtained by deception constitutes stolen goods for the purposes of ss.22 and 24 of the 1968 Act. Next, it is clear that a balance in a bank account, being a debt, is itself a thing in action which falls within the definition of goods and may therefore be goods which directly or indirectly represent stolen goods for the purposes of s.24(2)(a).

Further, where, as in the present case, a person obtains cheques by deception and pays them into her bank account, the balance in that account may, to the value of the tainted cheques, be goods which

'directly . . . represent . . . the stolen goods in the hands of the thief as being the proceeds of any disposal or realisation of the . . . goods stolen . . .'

within the meaning of s.24(2)(a). If, however, the prosecution is to prove dishonest handling by receiving, it is necessary to prove that what the handler received was in fact the whole or part of the stolen goods within the meaning of s.24(2)(a). To prove that, the prosecution must prove (i) that at the material time, namely, at the time of receipt by the handler, in such a case as this, the thief's bank balance was in fact comprised, at least in part, of that which represented the proceeds of stolen goods, and (ii) that the handler received, at least in part, such proceeds.

In some cases no difficulty will arise. For example, if the thief opened a new account and paid into it only dishonestly obtained cheques, then the whole balance would constitute stolen goods within the meaning of s.24(2)(a). If then the thief transferred the whole balance to an accused, that accused would, in our opinion, have received stolen goods. By the same reasoning, if at the material time the whole of the balance in an account consisted only of the proceeds of stolen goods, then any cheque drawn on that account would constitute stolen goods within s.24(2)(a). We have no doubt that when such a cheque is paid, so that part of such a balance in the thief's account is transferred to the credit of the receiver's account, the receiver has received stolen goods because he has received a thing in action which

'directly represents . . . the stolen goods in the hands of the thief . . . as being the proceeds of . . . realisation of the . . . goods stolen'

The same conclusion follows where the receiver directly cashes the cheque drawn on the thief's account and receives money from the paying bank.

The allegation in this case was that the accused received stolen goods when she received the thief's cheque. Counsel for the accused, in the course of argument, was disposed to accept a suggestion from a member of the court that a cheque drawn by the thief, directed to her bank, and intended to enable the accused to obtain transfer of part of the thief's credit balance, or cash, might not itself be stolen goods within the meaning of s.24(2)(a). This point is not necessary for decision on the point of law referred to us and it has not been fully argued. It appears to us that there is much to be said in favour of the proposition that receipt of such a cheque, drawn in circumstances wherein it is plain that it must serve to transfer the proceeds of stolen goods, would constitute receiving stolen goods on the grounds that such a cheque would directly or indirectly represent the stolen goods within s.24(2)(a).

The difficulties arise for the prosecution where, as in the present case, the stolen cheques are paid into a mixed account containing sums honestly obtained. In our opinion the difficulties are of proof and not of principle. The mere fact that stolen cheques have been paid into a mixed account will often render more difficult proof that at least part of what was received by an accused from that account represented the stolen goods in the hands of the thief as being the proceeds of the goods stolen. It does not preclude such proof. In some circumstances proof may be simple. For example, a particular account, into which it is proved that stolen cheques were paid, may have been little used with few cheques drawn on it. It might readily be demonstrated that the sum paid to the accused was in excess of that part of the balance which could possibly represent the proceeds of honest cheques. In such circumstances the accused would be shown to have received stolen goods within s.24(2)(a).

In the present case the prosecution sought such proof as to the nature of the payment received by the accused, from the statement which the accused made as to her understanding and intention when the payment was made. She had said that she regarded the payment to her as 'her share'. In our opinion, such an admission could not by itself prove either that part of the thief's bank balance did or could represent stolen goods within s.24(2)(a), or that part of such stolen goods was received by the accused. Her admission was, of course, plainly admissible on the issue of her knowledge that the payment represented stolen goods, and as to her honesty in receiving the money. On the issue of fact, however, whether the cheque received by her represented stolen goods, the primary rule is that an accused can only make a valid and admissible admission of a statement of fact of which the accused could give admissible evidence: see *Surujpaul Called Dick v. R.* (2). It is not necessary in this case to examine the limits of, or the extent of any exceptions from, that primary rule. In our opinion counsel for the Attorney-General was right in his submission when he acknowledged that the prosecution must, in such a case as this, prove in the first place that any payment out of a mixed account could, by reference to payments in and out, be a payment representing stolen goods. Unless she had personal knowledge of the working of the thief's

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account, the accused could make no valid admission as to that.

It is to be noted that the point of law referred to us contains the words 'is a jury entitled to infer . . . from the intention of the parties . . .?' The use of the plural 'parties' is misleading. There was no direct evidence in this case of what the intention of the thief might have been, only of that of the receiver. It may perhaps be that a payment can be proved to have been a payment of money representing stolen goods, even where there was enough honest money in the account to cover the payment, if there is proof direct or by way of necessary inference of the intention of the paying thief to pay out the stolen money. That problem can be decided when it arises. It does not do so here. The prosecution did not advance their case on such a basis. The only question arising on the facts here is whether a jury is entitled to infer that the payment represented stolen goods within s.24(2)(a) of the 1968 Act from the intention or belief of the receiver that it should or did. The answer is No.

Solicitors: *Director of Public Prosecutions; Pickering & Butters, Stafford.*
Reported by G.F.L. Bridgman, Esq., Barrister.

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HOUSE OF LORDS
(Lord Wilberforce, Lord Simon of Glaisdale, Lord Russell
of Killowen, Lord Keith of Kinkel, and Lord Roskill)
May 7, 1981

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GOLD STAR PUBLICATIONS, LTD. v. DIRECTOR OF
PUBLIC PROSECUTIONS

House of Lords

*Obscene Publication – Powers of search and seizure – Articles destined
for export and publication outside the jurisdiction of English courts
– Obscene Publications Act, 1959, s.3.*

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In a warehouse the property of the appellants the police, exercising their powers of search under s. 3 of the Obscene Publications Act, 1959, found and seized a large number of magazines which, according to standards in England, were "obscene articles". The great majority of these magazines were destined for export to Europe, America and elsewhere abroad, and the appellants contended that the Act of 1959 did not apply to such material. Justices made an order under s. 3(3) of the Act of 1959 for the forfeiture of the magazines, the Crown Court dismissed an appeal by the appellants against that order, and a Divisional Court dismissed the appellants' further appeal therefrom. On an appeal to the House of Lords,

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Held: the Act of 1959 applied not only to material published in this country but also to material destined for export and publication outside the jurisdiction of the English courts; the appeal was dismissed.

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**Appeal by Gold Star Publications Ltd against an order of a
Divisional Court of the Queen's Bench Division dismissing an appeal
by them by way of Case Stated from an order made by Croydon
Crown Court.**

*L. Blom-Cooper QC and G. Robertson for the appellants.
D. Tudor Price and T. Davis for the respondent.*

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Their Lordships took time for consideration.

May 7, 1981. The following opinions were delivered.

LORD WILBERFORCE. My Lords, s. 3 of the Obscene Publications Act, 1959, entitles the police, on warrant issued by a magistrate, to seize and remove obscene articles from premises in which they are 'kept for publication for gain'. By subsequent proceedings, the articles so seized may be forfeited. In the appellants' export warehouse at Whyteleafe, Surrey, the police found a large number of magazines which were, according to standards applied in England, undoubtedly 'obscene articles', viz hard pornography. Of these the great majority, some 150,000 in all, were, according to the appellants' contentions, which the justices and the Crown Court must have accepted, for export to Europe, America, Africa and elsewhere abroad, though there were a few destined for sale in this country by mail order. This has given rise to the certified question of law whether the Act applies not only to material published in this country but to material destined for publication

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overseas. The issue depends entirely on the scope to be given to the words 'kept for publication for gain', in, of course, their context. I do not think, though the contrary was submitted, that the case raises any question as to the territoriality or extra-territoriality of United Kingdom legislation: the property in question is located in this country, and the disposal of it by the police is to take place in this country. Nor are authorities as to composite crimes, that is crimes of which some elements may occur within and some outside the jurisdiction, of any help or relevance. Nor is the fact, if it be so, that property interests of foreigners may be affected by the seizure of any relevance. Foreigners may be, and commonly are, interested as importers, or indeed as publishers, of obscene literature or articles, but within the United Kingdom they are totally subject to our laws against obscenity.

The relevant words are quite general, but it is necessary to consider the implications of holding that they apply to articles intended for export. The question is a quite legitimate one, whether Parliament intended this piece of legislation to apply to articles which could not deprave or corrupt the British public, but were sent to places outside the jurisdiction of English courts. There were two objections against ascribing this intention to Parliament. First it may be said that to do so would be a kind of moral imperialism, or at least paternalism. The answer to this is that Parliament's intentions cannot be limited in this way. Parliament may well have desired to prevent this country becoming the source of a flourishing export trade in pornography, and may have thought that profits made by exports could help to sustain domestic trade. The words 'for gain' seem to me significant. Further, the Act does not apply to Scotland or Northern Ireland, so it would follow from the appellants' argument that articles destined for those parts of the United Kingdom could not be seized. It seems to me most unlikely that Parliament can have intended this, and, if not, it must follow that articles destined for export to other countries must be capable of seizure. One may add that to exempt articles intended for export would offer an easy pretext for avoiding the application of the section. So I cannot accept that Parliament must be supposed to have intended to confine this power to articles intended for publication in England or Wales.

But, secondly, it may be said that to extend the Act to articles destined for export would make the Act unworkable. Obscenity, viz tendency to deprave or corrupt persons likely to read the relevant matter (see s. 1 of the Act), is relative: what may deprave or corrupt some may have no effect, or, theoretically a beneficial effect, on others: see *Director of Public Prosecutions v. Whyte* (1), *Director of Public Prosecutions v. Jordan* (2), and the *Handyside* case (December 7, 1976, Series A No 24), decided by the European Court of Human Rights (3). How, it may be asked, can magistrates decide on the likely effect of this material on foreigners of different attitudes and mores? How (still less) can they decide on a defence of the public good if this is raised under s. 4 of the Act?

- (1) 136 JP 686; [1972] AC 849
- (2) 141 JP 13; [1977] AC 699

- (3) Dec. 7, 1976. Series A No. 24. European Court of Human Rights

In my opinion it has to be accepted that in some cases the magistrates will not be able to form any opinion on this matter. In such cases, since the court has to be satisfied that the articles are obscene (see s. 3(3)), it would have to release them. In other cases there might be evidence before them either way: that the articles would not tend to deprave or corrupt likely readers in the country of destination, or that they would. Then they would have to decide on the evidence. In still other cases they would be justified in taking the view that, having regard to the likely readers, the articles were so clearly obscene that evidence was not needed. As was said in *Transport Publishing Co Pty Ltd v. Literature Board of Review* (4) there is such thing as ordinary human nature which is not a subject for proof by evidence. If a defence of public good is raised, they must deal with it on the evidence.

In the present case, the Crown Court took the view that the articles were clearly obscene. The decision shows that the members of the court perused agreed samples; they found that they consisted of photographs and written matter in the English language, the price of the articles was given in United States, Canadian or Australian dollars:

They are plainly not intended for publication to some remote and primitive tribe who would not comprehend them. We can properly infer and do infer that they were intended to be published to persons . . . who have some standard of literacy in English and who would comprehend them and that the effect of them would be such as to tend to deprave and corrupt those persons.'

These findings to my mind show both that the Act is workable as regards exports, and that the court properly applied its mind to the probable effect of the articles on likely readers. The Divisional Court so found, and I agree with their judgment. In my opinion, therefore, the certified question should be answered in the affirmative with the rider that the word 'overseas' should properly be 'outside the jurisdiction of the English courts', and the appeal dismissed.

LORD SIMON OF GLAISDALE. I have the misfortune to differ from my noble and learned friends. I venture a few words in deference to the argument by which I was convinced and because consideration of the report of the Committee on Obscenity and Film Censorship (chairman, Professor Bernard Williams) might embrace the question how far English law really wishes to concern itself with the morals of foreign nationals.

I do not think that the instant issue can be resolved merely by fastening on the words 'publication for gain': 'publication' cannot here be construed as an abstraction. With publication to whom was Parliament concerned? It seems to be inherently unlikely that Parliament was concerned with the effect of obscene publications on anyone outside the United Kingdom. It would be mere officiousness in any case to seek to impose our own rules and standards and forensic judgments for the moral welfare of foreign nationals. And this is a field in which cultural

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standards and legislative policies are notoriously diverse. The inherent unlikelihood of Parliament being concerned with the morals of foreign nationals, and therefore with publication abroad, is borne out when the 1959 Act is purposively construed. It had two objectives: first, to enable serious literary, artistic, scientific or scholarly work to draw on the amplitude of human experience without fear of allegation (which was implicit in the previous law) that it would conceivably have a harmful effect on persons other than those to whom it was in truth directed, and, secondly, by hiving off such work, to enable effective action to be taken against the exploitation of 'hard pornography', obscene articles without pretension to any literary, artistic, scientific or scholarly value. These twin objectives are, indeed, indicated in the long title of the Act:

"to amend the law relating to the publication of obscene matter; to provide for the protection of literature; and to strengthen the law concerning pornography."

It is, incidentally, a mistake to suppose that the phrase 'strengthen the law concerning pornography' in the long title involves any artificial construction of the powers of search, seizure and forfeiture in s. 3 of the Act. There were such powers in the Obscene Publications Act, 1857. The changes made in 1959 as regards such powers were as follows: (i) certain interested persons other than the person summoned became entitled to be heard by the court; (ii) the operation of the powers was extended to cover articles on a stall or vehicle; (iii) a search warrant empowered the police to seize documents related to a business; (iv) it was no longer necessary for the complainant to swear that there had already been a publication; (v) the defence of 'public good' under s. 4 became available in forfeiture proceedings. These changes sufficiently explain everything in the long title so far as it relates to the powers of search, seizure and forfeiture. They give no warrant to construction of s. 3 to protect the morals of foreign nationals living in foreign countries. I can well believe that not a few people hold that, notwithstanding any difficulty in defining internationally acceptable standards of what is obscene, it is the moral duty of the British legislature to inhibit international trade in pornographic material. But, if so high-minded an objective had really been one of the purposes of the 1959 Act, it would certainly have been stated in the long title. Its absence is clamant when it comes to a purposive interpretation of the enacting provisions.

The inherent unlikelihood of Parliament legislating to safeguard from moral pollution foreign nationals in foreign countries, regardless of the policies of their own respective legislatures, the confirmation of such self-restraint by scrutiny of the long title, and the absence of any contra-indication in the enacting provisions, these considerations are borne out by a further one; the nature of the tasks imposed on the justices in the forfeiture jurisdiction. They have in the first place to determine whether the material liable to forfeiture is likely to deprave and corrupt a significant proportion of the persons likely to be exposed to it. They have, second, to determine whether publication was nevertheless justified as being for the public good on the grounds of its literary etc value. English justices are capable of making such judgments

in respect of their fellow citizens in the United Kingdom. To form such a judgment for the benefit of, say, Danes (even those who can read English), not to mention the people of East Africa or Rastafarians in the Caribbean (who, incidentally, can presumably read English), seems an unlikely task to be imposed by Parliament. In my respectful submission the argument reduced itself to absurdity when counsel for the respondent candidly accepted that in principle it had to extend to a publication in Arabic for export to an Arabic-speaking country, and presumably even if the owner of the material and prospective publisher was himself a national of the country to which the export was proposed.

But the difficulty facing the justices on the construction contended for by the prosecution is not limited to the task of determining what will deprave and corrupt people with whom they might well have no cultural standards in common. By s. 4 of the 1959 Act they have to go on to determine in respect of such people whether the deleterious tendency of the material is outweighed by the benefits conferred by its literary, artistic, scientific etc value. This balancing task is difficult enough in the case of performance by English justices as regards fellow citizens; it seems to me so impossible of performance as regards exotic peoples as to constitute yet further indication that Parliament was not concerned at all with publication in foreign countries.

Counsel for the appellants put in the forefront of his argument the undoubted principle that it is only exceptionally (and then by clear words) that United Kingdom legislation operates extra-territorially. I do not think that this rule assists the appellants' case directly, since, although the material in question was destined for abroad, it was seized and declared to be forfeited within the jurisdiction. But two concepts lie behind this rule. First, that Parliament does not legislate where it has no effective power of enforcement; this does not assist the appellants, since enforcement here is within the jurisdiction. But the second concept does indeed further the appellants' argument: the rule is also based on international comity. Other than quite exceptionally, sovereigns do not meddle with the subjects of foreign sovereigns within the jurisdiction of those foreign sovereigns, a consideration inherently potent in matters where international standards vary greatly. It is in this indirect way that the presumption against extra-territoriality avails the appellants.

Counsel for the appellants sought to support his argument based on extra-territoriality by reference to the fact that the Act does not extend to Scotland or Northern Ireland. I do not think this helps the appellants. In so far as the presumption against extra-territoriality assists the appellants, it is because sovereigns do not legislate for foreign subjects, and Scots and Northern Irish are not foreign subjects. But if the argument that the Act does not extend to Scotland or Northern Ireland does not help the appellants, neither does it avail the prosecution. It is said that, if the forfeiture provisions of the Act do not extend to material destined for publication in foreign countries, neither can they apply to material designed for publication in Scotland or Northern Ireland. I do not think that this follows at all. Legislation of this type is characteristically cast in separate English and Scottish (and sometimes Northern Irish) enactments; this merely reflects the several systems of

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law which operate within the United Kingdom. But an Act which does not extend beyond England and Wales (or Scotland) is still passed by a Parliament consisting of representatives of England, Wales, Scotland and Northern Ireland. If such a Parliament passes an Act limited to England and Wales it does not imply that Scotland is regarded as a foreign country. A Parliament in which the people of Scotland and Northern Ireland are represented may be legitimately concerned with material in England which would deprave and corrupt people in Scotland or Northern Ireland, without its being an inevitable conclusion that such a Parliament legitimately has an equivalent concern to impose its domestic standards of morality on foreign people. Equally, the fact that Parliament does not concern itself with the morals of the people of Denmark does not imply that it must necessarily show unconcern for the welfare of the people of Scotland. As for 'export', which is the word which appears in the point of law certified for your Lordships' consideration, not since the Union with Scotland Act, 1706, has the traffic of goods across the Scottish border been described as 'export'; and not since the days of Canute has traffic from England to Denmark been otherwise described. This is no mere verbal point: it indicates the fallacy of arguing that, if Parliament did not intend 'publication' to extend to publication to persons for whom it has no political concern, then Parliament must equally be credited with unconcern as to the effect of publication in Scotland or Northern Ireland.

There is one further matter which I think reinforces the interpretation I venture to put on the Act, namely, that 'publication' was not intended to extend to publication in foreign countries. Parliament has not only legislated generally in this field by the Obscene Publications Act, 1959; it has also legislated particularly within the field by the Protection of Children Act, 1978. That is an Act to prevent the exploitation of children by making indecent photographs of them, and to penalise the distribution, showing and advertisement of such indecent photographs. The Act contains provisions for entry, search, seizure and forfeiture similar to those in the Obscene Publications Act, 1959. But the significant feature of the Protection of Children Act, 1978, in contrast to the 1959 Act, is that it contains a provision whereby offences under the Act are to be included in the list of extradition crimes contained in sched. 1 to the Extradition Act, 1870. The effect of this is that the British government can negotiate treaties with foreign powers providing for the mutual extradition of persons who have committed the extradition crime. The 1978 Act thus shows the different way in which Parliament proceeds when it evinces concern for offences against decency which might affect the nationals of foreign powers. For these reasons I would allow the appeal, holding that s. 3 of the Obscene Publications Act, 1959, does not apply in respect of articles which are 'destined for export and publication overseas'.

LORD RUSSELL OF KILLOWEN: I have had the advantage of reading in draft the speeches prepared by my noble and learned friends Lord Wilberforce and Lord Roskill. I agree with them and concur in the answer proposed to the question posed and the dismissal of this appeal.

LORD KEITH OF KINKEL: I have had the benefit of reading in draft the speech of my noble and learned friend Lord Wilberforce. I agree with it, and for the reasons which he gives I too would answer the certified question in the manner which he proposes, and dismiss the appeal.

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LORD ROSKILL: The appellants appeal to your Lordships' House against an order of the Divisional Court (Eveleigh LJ and Watkins J) made on 2nd April, 1980, dismissing an appeal by way of Case Stated from an order made by the Crown Court at Croydon (his Honour Judge Thomas sitting with justices) on 2nd May, 1979. The Crown Court had dismissed an appeal by the appellants from an order made by justices sitting at Croydon Magistrates' Court on 12th December, 1978, pursuant to the powers conferred on them by s. 3(3) of the Obscene Publications Act, 1959. That order was for the forfeiture of no less than 151,877 magazines published by the appellants and seized on 21st April, 1978, in the appellants' export warehouse, pursuant to a warrant issued under s. 3(1) of the 1959 Act on 18th April, 1978. The total market value of those magazines is found by the Crown Court to have been of the order of £150,000. The Divisional Court certified this question for your Lordships' House as a point of law of general public importance:

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'Whether in proceedings for forfeiture under s. 3 of the Obscene Publications Act, 1959, where articles have been seized in a warehouse in England but are destined for export and publication overseas, having regard to the definition of obscenity in s. 1(1) of the Act, an English court is both competent and entitled in law to hold that these articles are obscene.'

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The Divisional Court refused leave to appeal to your Lordships' House but that leave was granted on 3rd July, 1980.

The appeal indeed raises a point of general importance under the 1959 Act in relation to magazines and the like found by justices to be 'obscene' but which are destined for export and thus for publication overseas, for it is submitted on the appellants' behalf that in such a case it is not within the power of an English court of otherwise competent jurisdiction to make a forfeiture order such as was made in the present case. Whether this submission is well founded depends solely on the true construction of the 1959 Act. For ease of reference I set out in full the several relevant parts of that statute. The long title reads thus:

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'An Act to amend the law relating to the publication of obscene matter; to provide for the protection of literature; and to strengthen the law concerning pornography'.

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The following sections are the most relevant:

Section 1(1) For the purpose of this Act an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a

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whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

(2) In this Act "article" means any description of article containing or embodying matter to be read or looked at or both. . . .

(3) For the purpose of this Act a person publishes an article who — (a) distributes, circulates, sells, lets on hire, gives, or lends it, or who offers it for sale or for letting on hire . . .

Section 3(1) If a justice of the peace is satisfied by information on oath that there is reasonable ground for suspecting that, in any premises in the petty sessions area for which he acts, or on any stall or vehicle in that area, being premises or a stall or vehicle specified in the information, obscene articles are, or are from time to time, kept for publication for gain, the justice may issue a warrant under his hand empowering any constable to enter (if need be by force) and search the premises, or to search the stall or vehicle, within fourteen days from the date of the warrant, and to seize and remove any articles found therein or thereon which the constable has reason to believe to be obscene articles and to be kept for publication for gain . . .

(3) Any articel seized under subs. (1) of this section shall be brought before a justice of the peace acting for the same petty sessions area as the justice who issued the warrant, and the justice before whom the articles are brought may thereupon issue a summons to the occupier of the premises or, as the case may be, the user of the stall or vehicle to appear on a day specified in the summons before a magistrates' court for that petty sessions area to show cause why the articles or any of them should not be forfeited; and if the court is satisfied, as respects any of the articles, that at the time when they were seized they were obscene articles kept for publication for gain, the court shall order those articles to be forfeited: Provided that if the person summoned does not appear, the court shall not make an order unless service of the summons is proved.

(4) In addition to the person summoned, any other person being the owner, author or maker of any of the articles brought before the court, or any other person through whose hands they had passed before being seized, shall be entitled to appear before the court on the day specified in the summons to show cause why they should not be forfeited . . .

(7) For the purposes of the section the question whether an article is obscene shall be determined on the assumption that copies of it would be published in any manner likely having regard to the circumstances in which it was found, but in no other manner . . .

Section 4(1) A person shall not be convicted of an offence against s. 2 of this Act, and an order for forfeiture shall not be made under the foregoing section, if it is proved that publication of the article in question is justified as being of the public good on the ground that it is in the interest of science, literature, art or learning, or of other objects of general concern.

(2) It is hereby declared that the opinion of experts as to the

literary, artistic, scientific or other merits of an article may be admitted in any proceedings under this Act either to establish or to negative the said ground.

'Section 5(3) This Act shall not extend to Scotland or to Northern Ireland.'

My Lords, it is important to observe that, as already mentioned, the present proceedings arise under s. 3 of the 1959 Act. That section, unlike s. 2(1) which was later amended by s. 1 of the Obscene Publications Act, 1964, does not create a criminal offence and a person whose property is seized or forfeited under s. 3 is not for that reason alone guilty of a criminal offence. Section 3 is concerned with prevention and not with punishment and is one of the provisions in the 1959 Act which is designed, as the long title of that Act shows, 'to strengthen the law concerning pornography'. No prosecution of the appellants has taken place. The Crown Court made the following findings of fact relevant to the present appeal:

'The forfeited magazines fall into three groups. (i) In the first group are 391 magazines which were found in the mail order department of the appellants' premises. These were destined for home consumption. (ii) The second group consists of 6,609 magazines which were packed in crates ready for export to the U.S.A. (iii) The third group consists of 144,877 magazines. These were found in the export warehouse at the appellants' premises. We do not know the precise destination of any of them, but we have been told that the appellant company exports its publications to Europe, America, Africa and elsewhere abroad.'

Nothing turns in the present appeal on the first of those three groups.

The first question to determine is the true construction of the relevant words in s. 3(1) of the 1959 Act. The condition precedent to the right of a justice to issue a warrant is that he is satisfied that in the area in question 'obscene articles are, or are from time to time, kept for publication for gain . . .' It was strenuously argued that these words mean 'kept for publication in England and Wales for gain in England and Wales and that any other construction would involve giving extra-territorial effect to these provisions of the 1959 Act when not only was there no clear provision to that effect but it could not have been the intention of Parliament in this statute to concern itself with the morals of persons outside the jurisdiction. It was further argued that the construction contended for by the respondent could not be correct since to accept that construction would or might involve the forfeiture of property, rights or interests within the jurisdiction of persons outside the jurisdiction. My Lords, this last point, though argued first, may be quickly disposed of. Not only is there no finding that any property, rights or interests within the jurisdiction of persons outside the jurisdiction are presently involved, but, even if there were such a finding, there could be no objection to such property, rights or interests being subjected to legislative control by Parliament.

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There are no express words of limitation on the relevant words in s. 3(1). Moreover the 1959 Act has no application to Scotland or Northern Ireland. Though the certified question is stated to relate to export 'overseas', the appellants' argument, if sound, must apply equally to obscene articles (as defined in s. 1(2)) kept in England not for export overseas, as in the present case, but for dispatch ('export' is hardly the right word) to Scotland or Northern Ireland. My Lords, there being no express words of limitation in s. 3(1), the limitation contended for by the appellants must be deduced, if at all, from other provisions of the 1959 Act. In my view no question of the extra-territorial effect of legislation in the proper understanding of that phrase arises in this appeal. The magazines in question are within the jurisdiction. The place of their seizure was within the jurisdiction. The appellants are a limited company amenable to the jurisdiction. No question of extra-territoriality arises in connection with s. 3.

The crucial question is whether, because of the definition of obscenity in s. 1(1) and also because of the provisions of s. 4, a narrow meaning must be given to the all important words in s. 3(1), notwithstanding the absence of any words of limitation in that subsection. The strongest way in which the appellants' case can be put arises from the fact that, since the passing of the 1959 Act, there is no longer any 'abstract' concept of obscenity. As Lord Wilberforce pointed out in *Director of Public Prosecutions v. Whyte* (1) and again in *Director of Public Prosecutions v. Jordan* (2), s. 1 is directed to 'relative obscenity', that is, obscenity relative to likely readers or other likely recipients of the article in question. It has thus become important in these cases to determine who are the likely readers or customers, for it is only when that class or those classes have been sufficiently identified that the next question arises, namely, whether the allegedly offending article will 'tend to deprave and corrupt persons' who form a significant part of that class or of those classes. Only if that further condition is satisfied will the article in question then be 'obscene' within s. 1(1). This being the true construction of this subsection, the question is naturally forcefully asked on the appellants' behalf how an English magistrates' court can possibly answer these questions in relation to persons of no known or readily identifiable class or propensity in different countries throughout the world. It is further asked why Parliament should have concerned itself with the protection of the morals of such persons whoever they may be. Standards of morality vary immensely in different countries and what is forbidden or is obscene in one country may even be thought to be therapeutic in another. Reliance was placed in this connection on the opinion of the Advocate-General (J-P Warner) in *R. v. Henn, R. v. Darby* (5) quoting from the judgment of the European Court of Human Rights in the *Handyside* case (3) and also on the passage in the judgment of the Court of Justice of the European

- (1) 136 JP 686; [1972] AC 849
 (2) 141 JP 13; [1977] AC 699

(3) Dec. 7, 1976. Series A No. 24. European Court of Human Rights.

(5) [1980] 2 All ER 166

Communities in *Henn* (5):

'In principle, it is for each member State to determine in accordance with its own scale of values and in the form selected by it the requirements of public morality in its territory.'

These are powerful arguments and they can be reinforced by consideration of how the defence of 'public good' introduced by s. 4 of the 1959 Act could be effectively raised in such circumstances as those now under consideration. But, powerful as these arguments are, they seem to me to overlook the fact that the 1959 Act was concerned among other matters to strengthen the law concerning pornography and that one of its objectives in s. 3(1) is to stop persons in England and Wales 'publishing for gain'. 'Publish', so far as presently relevant, is defined in s. 1(3)(a) and if a person in this country, for example, offers an article for sale he is publishing that article. If that article is obscene he is publishing an obscene article for sale, and if he does so for valuable consideration he is publishing an obscene article for gain. On a fair reading of s. 3(1) I am unable to see why he ceases so to publish an obscene article for gain because its ultimate destination is in Scotland, Northern Ireland or anywhere else in the world, for Parliament may very well have intended that England and Wales should not become a source from which unrestricted supplies of obscene articles should flow unchecked not only to other parts of the United Kingdom but also to other countries throughout the world.

My Lords, I fully recognise that this conclusion may face a magistrates' court with difficult practical and evidential problems. But their task in administering the 1959 Act and the later amending legislation on this subject has long been recognised as difficult, unenviable and a matter for sympathy. It is not correct to say that a magistrates' court grappling with this problem will be asked to apply English standards of morality to allegedly offending articles elsewhere. The court will be asked to do its best to decide whether those articles will have a tendency to deprave or corrupt a significant number of people in the country to which they are destined. It would be open to those objecting to forfeiture, and thus exercising their rights under s. 3(3) and (4), to adduce evidence to show that the conditions specified in s. 1(1) have not in relation to the particular destination in question been satisfied. Moreover, I see no reason in principle why, if it is desired in a particular case to raise the 'public good' defence, it should not be possible to do so. In principle I see no objection to seeking to show by admissible evidence that a particular article is to be regarded in a particular country to which it is destined as of (for example) literary merit even though it might not be so regarded in this country.

Two other matters shall be mentioned for the sake of completeness. First, reliance was placed on the appellants' behalf on the Protection of Children Act, 1978, and in particular on the extradition conditions in s. 1(6) of that statute, a provision omitted from the 1959 Act. My Lords it cannot be right to interpret the 1959 Act by reference to another Act passed nearly twenty years later on a different subject-

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matter. The presence of an extradition provision in the 1978 Act or the absence of such a provision in the 1959 Act are not aids to the construction of s. 3(1) of the latter statute. Secondly, much reliance was placed on the decision of the Court of Appeal in *Attorney General's Reference (No 2. of 1975)* (6). With respect, I have not found that decision of assistance in determining the present appeal.

In the result I would answer the certified question in the affirmative, subject to the amendment proposed by my noble and learned friend Lord Wilberforce, and I would dismiss this appeal for substantially the same reason as those given in the Crown Court and in the Divisional Court in their clear and succinct judgments.

Appeal dismissed

Solicitors: *Offenbach & Co; Director of Public Prosecutions.*

Reported by G.F.L. Bridgman, Barrister.

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QUEEN'S BENCH DIVISION
(Donaldson, L.J., and Kilner, J.)
December 8, 1980

Soanes
v.
Ahlers

SOANES v. AHLERS

Queen's Bench
Division

Road Traffic — Disqualification of driver — Convictions within proceeding three years — Endorsement of second conviction later than three years period — 'Totting-up' provisions of Road Traffic Act, 1972, s.93(3).

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On January 9, 1980 magistrates refused to disqualify the respondent under the "totting-up" provisions of s.93(3) of the Road Traffic Act, 1972. He had been previously convicted on November 4, 1976 and again on October 24, 1979 of offences within the section, but the endorsement in respect of the second conviction was not put on his licence until November 21, 1979. The magistrates were of opinion that, as more than three years had elapsed between the first of those convictions and the date when the second endorsement was put on his licence, he did not come within the sub-section. On appeal by the prosecution,

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Held: the words in the section 'within the three years immediately preceding the commission of the offence' qualified the two previous convictions but not the endorsement of the second of those convictions; the decision of the justices, therefore, was wrong and the respondent was liable to be disqualified under the provisions of s.93(3).

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Case Stated by Norwich justices.

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M. Lewer for the appellant
A. Hooper for the respondent.

Donaldson, L.J.

DONALDSON, L.J.: This is an appeal by Case Stated from a decision of justices for the county of Norfolk sitting at Norwich, who on the 9th January, 1980, refused to disqualify the respondent, Keith Norman Ahlers, under the "totting-up" provisions, that is to say s.93(3) of the Road Traffic Act, 1972. It is a problem of dates and the construction of the section. The magistrates came to the conclusion that Mr. Ahlers was not within the section.

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The dates were these. He had been convicted on the 4th November, 1976, of an endorsable offence. On the 24th October, 1979, he had again been convicted of an endorsable offence, exceeding the speed limit on the 7th September, 1979, but there was a delay from the 24th October, 1979 until the 21st November, 1979 before the endorsement was put on his licence. Thus more than three years had elapsed between the first of the two convictions, that is to say the 4th November, 1976, and the date when the second of the two endorsements was put on his licence, that is to say the 21st November, 1979. The justices thought that in those circumstances he was not within the section, and I have no doubt that they were wrong.

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Section 93(3) of the Road Traffic Act, 1972 reads:

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"Where a person convicted of an offence involving obligatory disqualification has within the three years immediately preceding the commission of the offence been convicted on not less

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than two occasions of any such offence and particulars of the convictions have been ordered to be endorsed in accordance with s.101 of this Act, the court shall order him to be disqualified for such period not less than six months as the court thinks fit, unless the court is satisfied, having regard to all the circumstances, that there are grounds for mitigating the normal consequences of the conviction and thinks fit to order him to be disqualified for a shorter period or not to order him to be disqualified."

If the magistrates are right and the phrase "within the three years immediately preceding the commission of the offence" qualifies not only the fact of conviction but also the ordering of particulars to be endorsed on his licence, it must be possible to set the section out using (a) and (b) or in such a way lettering sub-clauses as to show this. Accordingly we invited counsel for the respondent to do that, but he was unable to do so because it cannot be done. The proper way to read this section is as follow: "Where (a) a person convicted of an offence involving obligatory or discretionary disqualification has within the three years immediately preceding the commission of the offence been convicted on not less than two occasions of any such offence and (b) particulars of the convictions have been ordered to be endorsed in accordance with s.101 of this Act . . ." So read, the section makes sense. If you put the (a) and (b) in anywhere else it makes nonsense. It follows that the magistrates were wrong. Nevertheless, there is a time factor. The two endorsements must have been ordered before the motorist appears before the court on the third occasion because the section there speaks in the past tense.

For those reasons I would answer the question posed in the Case by saying to the magistrates that they were not correct in their interpretation of s.93(3) and that the respondent was liable to be disqualified under the provisions of the subsection.

KILNER BROWN, J: I agree. Not for the first time the editors of Wilkinson in the 10th edition have correctly anticipated a decision of this court. There appears to be no authority on this particular matter before the judgment which has just been given by my Lord, but one finds at p.547 of Wilkinson this sentence:

"While s.93(3) requires the commission of the third offence to be after the convictions for the earlier offences, a strict reading of the sub-section does not require the orders of endorsement in respect of those offences to be prior to the commission of the third offence. Thus if A commits an endorsable offence on 1 July, 1980, having been convicted and endorsed for an offence on 1 July, 1979, and convicted on 30 June, 1980, of another offence for which he was sentenced and has his licence endorsed on 14 July, 1980, he appears liable to 'totting-up' when he is subsequently convicted of the 1 July, 1980, offence."

There it was. In view of my Lord's judgment, with which I entirely

agree, once again the editors of Wilkinson have accurately foreseen a likely judgment of this court and now the interpretation of a particular section of the Road Traffic Act.

Solicitors: *Sharpe, Pritchard & Co. for D. I. Tomlinson, Norwich: Hill & Perks, Norwich.*

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Reported by G.F.L. Bridgman Esq., Barrister.

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JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
(Lord Hailsham L.C., Lord Diplock, Lord Edmund-Davies,
Lord Russell of Killowen, and Lord Roskill)
November 17, 1980

Prasad
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PRASAD v. THE QUEEN

Judicial
Committee
of the
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Criminal Law – Evidence – Confession – Function of jury.

The appellant, charged on a trial before a judge and assessors in the Supreme Court of Fiji with murdering his father, was convicted, and an appeal by him to the Fiji Court of Appeal was dismissed. The only evidence of his guilt was a confession which he was alleged to have made to the police. On a voire dire before the judge alone the appellant said that the alleged confession was a complete fabrication and he had been forced to initial it by violence inflicted on him by the police. The judge disbelieved the appellant's evidence on the voire dire: he held the confession was voluntary and admitted it as evidence. On an appeal to the Privy Council it was contended that the effect of *R. v. McCarthy* (1980) (70 Cr. App. R. 270) was that it was for the jury (in the present case for the assessors) to consider whether the confession was or was not voluntary and to assess the probative value of the evidence.

Held: all that *R. v. McCarthy* should be understood to mean was that in assessing the probative value of a confession a jury should take into consideration all the circumstances in which the confession was made including allegations of force if they thought they might be true; there was nothing which would justify the Board in reconsidering the sufficiency of the summing-up in the present case; and the appeal would be dismissed.

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Appeal by Ragho Prasad, against a judgment of the Fiji Court of Appeal, Criminal Division.

A. Scrivener QC and N. Murray for the appellant.
G. Newman for the Crown.

LORD DIPLOCK. At a trial in the Supreme Court of Fiji, held before Stuart J and five assessors, the appellant was convicted of murdering his father, and was sentenced to life imprisonment. He appealed to the Fiji Court of Appeal against his conviction on the ground of various alleged errors and other defects in the judge's summing-up

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to the assessors, whose unanimous opinion, with which the judge concurred, was that the appellant was guilty of murder. The Court of Appeal gave thorough and detailed consideration to these criticisms. They are dealt with in the judgment of the court delivered by Gould, V.P., who concluded by saying:

‘We have expressed some criticism of the summing-up but do not consider, in the light of the whole, that the learned judge went beyond permissible limits in permitting his opinion of some facts to be seen, and do not find any of the other criticisms urged by counsel are justified to such an extent as would induce us to allow the appeal.’

The practice of the Judicial Committee in the exercise of its appellate jurisdiction in criminal matters was authoritatively stated by Lord Sumner in *Ibrahim v. R* (1). The practice remains unchanged, and the whole passage bears repetition:

‘Leave to appeal is not granted “except where some clear departure from the requirements of justice” exists: *Riel v. R* (2); nor unless “by a disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done”: *Dillet’s Case* (3). It is true that these are cases of applications for special leave to appeal, but the Board has repeatedly treated applications for leave to appeal and the hearing of criminal appeals as being upon the same footing: *Riel’s Case* (2); *Ex parte Deemings* (4). The Board cannot give leave to appeal where the grounds suggested could not sustain the appeal itself; and, conversely, it cannot allow an appeal on grounds that would not have sufficed for the grant of permission to bring it. Misdirection, as such, even irregularity as such, will not suffice: *Ex parte Macrea* (5). There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future: *Reg. v. Bertrand* (6).

To this their Lordships would only add that courts of appeal composed of judges more familiar than members of this Board can hope to be with local conditions and social attitudes are in a better position than their Lordships to assess the likely effect of any misdirection or irregularity upon a jury or other deciders of fact in a criminal case. This is all the more so where, as in Fiji, the mode of trial is not the same as in England or Scotland. There is no jury; the trial is before a judge and

(1) [1914] AC 599

(2) (1885) 10 App. Cas. 675

(3) (1887) 12 App. Cas. 459

(4) [1892] AC 422

(5) [1893] AC 346

(6) 31 JP 531; [1867] LR 1 PC 520

assessors to the number of not less than four in capital cases. The judge sums-up to them; each then states his individual opinion as to the guilt of the accused. Although permitted to consult with one another they are not obliged to do so, and the ultimate decider of fact (as well as law) is the judge himself who need not conform to the opinions of the assessors, even though they be unanimous, if he thinks that their opinions are wrong. The field of comment on evidence that is proper to a judge in summing-up to a jury in a trial in which they are collectively the exclusive deciders of fact is not necessarily the same as in summing-up to assessors whose function it is to help the judge in making up his own mind as the sole ultimate determiner of fact.

Adherence to their settled practice, as described in *Ibrahim v. R* (1), makes it unnecessary in the instant case for their Lordships to do more than state in bare outline the case against the appellant, of which a full account is to be found in the judgment of the Court of Appeal. On 27th July, 1976, there had been a party attended by members of an extended Hindu family of which the deceased, the father of the appellant, was the head. It was held at premises in the compound where most of the extended family lived to celebrate the completion of the cane harvest by one of the appellant's brothers. The appellant, the deceased and some eight others were present, including one called Jai Raj. The deceased had left the party before it ended in order to go home to bed. His body was discovered some time later near a toilet in the compound. He had received some thirteen cuts from a sharp instrument of which four were very severe and were the cause of his death. For reasons into which it is unnecessary to enter the only evidence of the appellant's guilt that was available at his trial was a confession. If he had made it and it was true, it was conclusive of his guilt. The prosecution's case was that he had made it to a police inspector when he had been confronted with Jai Raj who had said to the appellant: 'When grandfather went to sleep, after some time when the dogs started barking, you went and came back after 10 to 15 minutes.' When asked by the inspector if what Jai Raj had said was true, the appellant replied:

'Yes, sir, now, this is true. My brother Sohan Lal said to get rid of this problem. My father went towards the house. A little after, I went and I was annoyed and struck him with a knife.'

'Q. How many times did you strike with a knife? A. Three or four times.'

'Q. What did you do with the knife? A. I kept the knife at home after washing it and the police took it from me.'

This dialogue was recorded in the inspector's notebook and initialled by the appellant. At the trial the admissibility of this confession was challenged on a *voire dire* before the judge in the absence of the assessors. The appellant gave evidence on oath. He alleged that what purported

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to be recorded in the notebook was a complete fabrication, he had never said it, it had never been read over to him, he had been forced to initial it as a result of violence inflicted on him by the police. The judge disbelieved the appellant's evidence on the voire dire. He held the confession to be voluntary and admitted it in evidence. At the trial in the presence of the assessors, the appellant again gave evidence on oath and made the same sort of allegations of fabrication and violence as he had made on the voire dire. Nevertheless the assessors were unanimous in their opinion that he was guilty beyond reasonable doubt, and that also was the opinion of the learned judge.

Of the complaints made in the Court of Appeal about the judge's summing-up it was sought on behalf of the appellant to re-argue two before this Board. The first was that the judge did not sufficiently stress to the assessors the danger of convicting on the evidence of the confession alone. Having admitted the confession on the voire dire he instructed the assessors:

'It was suggested to you that you have to be satisfied that the confession is voluntary, but that is not so. All you have to consider is whether the accused made the statement and whether it is true.'

He went on, however, to point out that, if they thought that the appellant had been forced to make it, they might think it was a very good reason why it was not true. The Court of Appeal were of opinion that the first sentence in the passage that their Lordships have reproduced verbatim correctly stated the law as laid down by the Board in *Chan Wai-Keung v. R* (7), and that the summing-up on the confession and the weight to be attached to it when taken as a whole was adequate. Before their Lordships, however, it was contended that, since the decision of the Fiji Court of Appeal in the instant case, the Court of Appeal in England had decided in *R. v. McCarthy* (8) that the question whether a confession that had been admitted on the voire dire was voluntary was for the jury to decide.

Their Lordships have considered the passage in *McCarthy* that was relied on. It consists of the few words emphasised hereunder in a single sentence of the judgment:

'If he [sc the judge] allows the evidence to be given, then it is for the jury to consider whether or not there was an inducement and whether or not it was voluntary and it is for the jury, after a proper direction, to assess its probative value . . .'

Looked at in their context the words emphasised may be equivocal, but the authorities cited for the proposition are *Chan Wai-Keung* (7) itself and *R. v. Burgess* (9), a decision of the Court of Appeal of England in which *Chan Wai-Keung* was followed and applied. In their Lordships' view all that the words emphasised should be understood to

(7) [1967] 2 AC 160

(8) (1980) 70 Cr. App. R. 270

(9) 132 JP 314; [1968] 2 QB 112

mean is that the jury should take into consideration all the circumstances in which a confession was made, including allegations of force, if it thinks they may be true, in assessing the probative value of a confession. So, in their Lordships' view, there is no fresh authority in this particular field of criminal law that would justify this Board in re-examining the sufficiency of the summing-up as respects the reliability of the confession, since this is a matter that was peculiarly the province of the Fiji Court of Appeal. The same applies to the criticisms advanced against the way in which the judge in his summing-up permitted his own views of the credibility of the appellant and of other witnesses to become apparent to the assessors.

Finally, their Lordships must deal briefly with a point on which they have not had the benefit of the views of the Fiji Court of Appeal, for the point was not taken before them. At an early stage in his summing-up, when he was in the course of narrating how the prosecution put its case, the learned judge mentioned that it was alleged that when the appellant rejoined the family party after 10 to 15 minutes' absence (during which he was alleged to have killed his father) he had changed his clothes. Jai Raj had in fact said this but not in the presence of the appellant. That Jai Raj had so informed the police inspector at a previous interview was extracted from the inspector in the course of cross-examination on behalf of the appellant. It was, however, hearsay and did not constitute evidence to which the deciders of fact were entitled to have regard in determining the guilt of the accused. Apart from this passing reference the judge never mentioned the change of clothes again. He never suggested that there was any evidence that the appellant had changed his clothes. He emphasised to the assessors that the only evidence against the appellant was the alleged confession, and the only subsequent reference that he made to the clothes of the appellant was to suggest to the assessors that it did not help at all in determining whether or not the confession was true. In their Lordships' view there is nothing in this fresh point. They are fortified in this view by the fact that despite what had obviously been a meticulous analysis of each sentence in the summing-up, it had never occurred to anyone to take the point in the notices of appeal (original and supplementary) to the Court of Appeal or at the hearing in that court or even in the appellant's written case before this Board. It was advanced for the first time at the oral hearing. Their Lordships will, accordingly, humbly advise Her Majesty that this appeal must be dismissed.

Appeal dismissed.

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Solicitors: *Philip Conway, Thomas & Co; Charles Russell & Co.*

Reported by G.F.L. Bridgman, Esq., Barrister.

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QUEEN'S BENCH DIVISION
(Forbes, J.)
February 10, 1981

**R. v. TORBAY JUSTICES. EX PARTE ROYAL BRITISH LEGION
(PAIGNTON) SOCIAL CLUB LTD.**

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Club — Sale of intoxicating liquor — Person admitted to club as being member of another club — Condition attached to registration certificate — Prohibition of supply to person under age of eighteen — Validity — Licensing Act, 1964, s.49(3)(4).

The applicant was a club registered under the Licensing Act, 1964, which fell within s.49(4)(c) of the Act. The rules of the club provided for the admission to the premises of the club of persons other than members and their guests and for the sale of intoxicating liquor to them by or on behalf of the club for consumption on the premises. On the renewal of the registration certificate which the applicant held, the justices attached to it a condition under s.49(3) of the Act prohibiting the supply of intoxicating liquor to any person under the age of eighteen years and the consumption of liquor by such persons on the club premises. The applicant sought an order for the judicial review of the order of the justices and an order of certiorari to bring up the order and quash it.

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Held: in the special circumstances of clubs which qualified under s.49(4) justices had no power to attach conditions relating to the sale of intoxicating liquor to "visiting" members, the condition which the justices purported to attach to the registration certificate in the present case was void, and should be erased from the certificate.

Application for judicial review of an order made by Torbay justices.

M. Harvey for the applicant.
The respondents did not appear.

Forbes, J.

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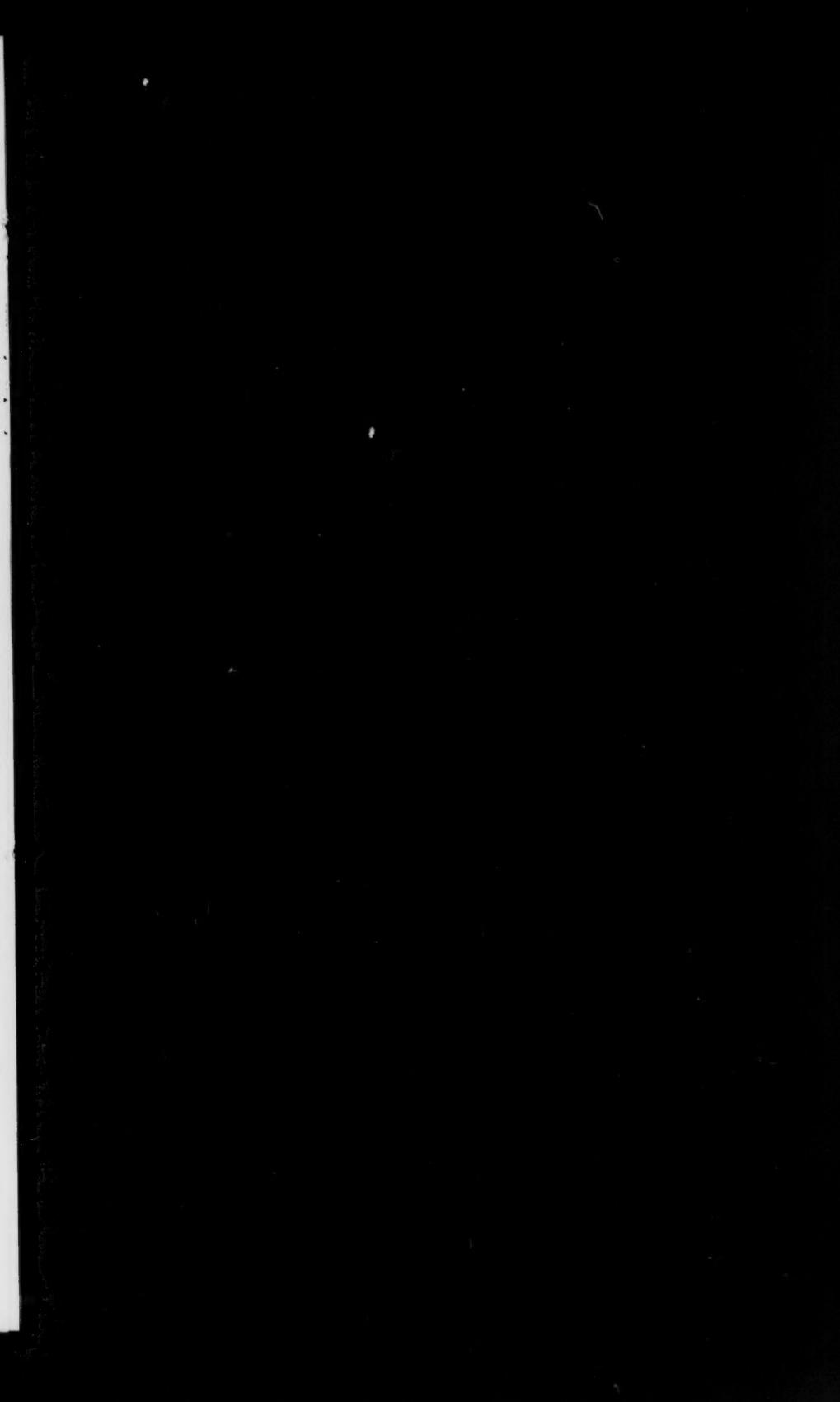
FORBES, J: In this matter counsel for the applicants moves for judicial review in the form of an order of certiorari to bring up and quash an order made at the Torbay magistrates' court on the 14th August, 1980, by which the magistrates attached a condition to the applicants' registration certificate.

The applicants are the Royal British Legion (Paignton) Social Club Ltd., and as such they qualify under the provisions of the Licensing Act, 1964, Part II, starting as s.39. Subsection (1) reads thus:

"No intoxicating liquor shall on any club premises be supplied by or on behalf of the club to a member or guest, unless the club is registered under this Act in respect of those premises or the liquor is supplied under the authority of a justices' licence held by the club for the premises."

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So the scheme is that a club may either qualify to supply — I mentally underline the work "supply" — intoxicating liquor by virtue of being registered as a club under this Act or by virtue of a justices' licence. I am not concerned in this case with a justices' licence, only with





registration under the Act. That is dealt with in ss.40 to 49 of the Act. Section 40(1) reads:

"A club is registered, within the meaning of this Act, in respect of any premises if and so long as it holds for those premises a certificate under this Part of this Act of a magistrates' court (in this Act referred to as a registration certificate)".

There follow provisions for the registration certificate to have effect for twelve months and for its renewal from time to time. One has to make an application to a magistrates' court, to comply with certain requirements of the schedule, and so on. There are certain restrictions on the powers of the magistrates to refuse an application. Section 41 gives the qualifications for registration. I do not think I need read those, but the club has to be a bona fide club and the magistrates are entitled to look into the matters mentioned in the section. There are then various other provisions about disqualification, objections to and cancellations of registration certificates, inspection of premises before the first registration, and so on.

Then one comes to s.49 which deals, not with supply, but with sale, a distinction which is well known and to which I shall briefly refer in a moment. Section 49(1) reads:

"Notwithstanding anything in any enactment, where a club is registered in respect of any premises, and the rules of the club provide for the admission to the premises of persons other than members and their guests and for the sale of intoxicating liquor to them by or on behalf of the club for consumption on the premises, then subject to the following provisions of this section the authority of a licence shall not be required for such a sale, and intoxicating liquor may be supplied to those persons and their guests for consumption on the premises as it may to members and their guests."

Subsection (2) of s.49 does not matter. Subsection (3) reads:

"Subject to subs.(4) of this section, a magistrates' court, on the issue or renewal of a registration certificate for any premises, may attach to the certificate such conditions restricting sales of intoxicating liquor on those premises as the court thinks reasonable (including conditions forbidding or restricting any alteration of the rules of the club so as to authorise sales not authorised at the time of the application to the court), and subs.(1) of this section shall not authorise the sale in breach of any such condition."

By subs. (4)

"No condition shall be attached to a registration certificate under subs.(3) of this section so as to prevent the sale of intoxicating liquor to a person admitted to the premises as being a member of another club, if . . . (c) each of the clubs is primarily a club for persons who are qualified by service or past service, or by any par-

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ticular service or past service, in Her Majesty's forces and are members of an organisation established by Royal Charter and consisting wholly or mainly of such persons; or (d) each of the clubs is a working men's club, that is to say, a club which is, as regards its purposes, qualified for registration as a working men's club under the Friendly Societies Act, 1896, and is a registered society within the meaning of that Act or of the Industrial and Provident Societies Act, 1893".

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It is plain that this club qualifies under (c) and in so far as it has reciprocal arrangements permitting members of other British Legion clubs to use the Paignton premises, both the clubs would qualify under para.(c). In addition, this club is a working men's club and qualifies under (d) as well. Consequently, if it has rules permitting members of other working men's clubs to use the club premises, then each of the clubs qualifies under (d) as well. The rules of this club provide that members of this club may not be under eighteen years of age and establish classes of members, that is to say, fully paid up, ordinary, or life members, and fully paid up women members, as well as fully paid up honorary members. The rules provided for associates in these terms:

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"Any member of an officially recognised Legion Club shall be admitted to the use of the club as an associate on production of membership and association card, . . . "

They also provide for temporary members in these terms:

"A serving member of H.M. Forces or a member of a team visiting the club in connection with any sports contest or a person specially invited by the committee to visit the club"

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and various other categories of persons

"may become a temporary member for the period of such visit or engagement only".

Rule 7(4) states:

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"Any association of the Working Men's Club and Institute Union Ltd., shall be admitted to the use of the club under s.(2) of this rule"

— that is the section dealing with associates. So beside the ordinary members there can be admitted to this club associates under (2), temporary members under (3), and members of other working men's clubs under (4). Rule 30 deals with the introduction of guests. It says:

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"An ordinary member or an associate admitted under r.7(2) but not a temporary member may personally introduce friends as his guests, but no person who is eligible for ordinary membership shall be so introduced more than twice within three months, . . . "

Then there are rules for certain categories who may not be admitted as visitors, and finally r.30 provides:

"Members shall be responsible for the good behaviour of guests introduced by them . . ."

It follows that not only may members of this club introduce their own friends as guests but associate members may also do so under that rule.

Going back briefly to the Act, it seems to me that the scheme of the Act is clear. The ordinary supply of intoxicating liquor in the club would be covered by the registration certificate which a club may obtain under that part of the Act. If a club wished to make any sales, were it not for s.49 those sales could only be made legally under the authority of a justices' licence, but s.49 relieves clubs who qualify under that section, in respect of persons admitted and qualifying under that section, from the necessity of obtaining a justices' licence.

At this point I ought briefly to refer to the distinction between sale and supply. This is a well-known distinction which goes back at least as far as *Graff v. Evans* (1). I need not read in full either the judgment of Field, J., or that of Huddleston, B. This case concerned a purchase (using that word in a neutral sense) by a club member of liquor. Perhaps I may take a brief passage from the judgment of Field, J., where he said:

"There was no contract between two persons, because Foster was vendor as well as buyer. Taking the transaction to be a purchase by Foster of all the other members' shares in the goods, Foster was as much a co-owner as the vendor. I think it was a transfer of a special property in the goods to Foster, which was not a sale within the meaning of the section."

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Similar expressions are to be found in *Trebanog Working Men's Club and Institute Ltd v. Macdonald* (2) in which Lord Hewart, CJ, giving the judgment of the court, said:

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"Ever since that date" [that is 1872] "it has been a matter of general agreement that the transaction which takes place in a members' club, in which the property in the liquor is in all the members equally, when a member orders and pays for intoxicating liquor, is not a sale at all in the sense in which that word is used in s.3, but is rather to be deemed the transfer of a special property in the goods from all the other members of the club to the consumer in consideration of the price paid."

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A similar reference is to be found in the judgment of Lord Parker, CJ, in *French v. Hoggett* (3).

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(1) (1882) 46 JP 262; 8 Q.B.D. 173

(2) (1940) 104 JP 171; [1940] 1 KB 576

(3) 132 JP 91; [1968] 1 WLR 94

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It is, I conceive, a well-known principle that when a member of a club buys liquor at the bar, that is a supply and not a sale, but when a person who is admitted to a club under its rules but is not a member does the same thing, that is a sale and not a supply. Section 49 is clearly intended to deal with that situation. It is plain to me that under s.49(3) the magistrates could, if they wished, in an ordinary case attach conditions to the sales of liquor. The one they purported to attach in this case was:

"The supply of intoxicating liquor to any person under the age of eighteen years and the consumption of intoxicating liquor by such persons on club premises shall be prohibited."

This was done, as I understand it, in answer to representations made by the police authority (police authorities being entitled to make such representations under s.49(6)) that there was a problem about drunkenness among young people under the age of eighteen. The police wanted to see that conditions of this kind were attached to registrations so as to prevent in clubs that which would be illegal in public houses, namely, the consumption of liquor by persons under eighteen.

However laudable the object of the police may have been, they could, of course, only attach such conditions as the statute permits. It is plain that they cannot attach conditions relating to the supply of intoxicating liquor, nor I think to the consumption, but only to sales of intoxicating liquor. In the ordinary event, therefore, magistrates have power to apply such conditions (there is nothing wrong intrinsically with a condition restricting *sales* to persons under the age of eighteen years) and they could well have introduced or attached such a condition to a registration certificate in the ordinary case, but in this case, there is another reason why they cannot even do that, and that is the provisions of s.49(4) which the magistrates seem to me to have overlooked.

In the special circumstances of clubs which come within subs. (4) it seems to me that the magistrates have no power to attach conditions even relating to the *sale* of intoxicating liquor to "visiting" members and consequently the condition which they purported to attach in this case, and which would have that effect, they had no jurisdiction to attach. I am asked to make a declaration in respect of that and I declare that the condition is void and of no effect. This appeal succeeds, the order which is brought up should be quashed, and the condition erased from the applicants' registration certificate.

Solicitors: *Hewitt, Woollacott & Chown.*

Reported by G.F.L. Bridgman, Esq., Barrister.

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QUEEN'S BENCH DIVISION
(Lord Lane, C.J., and Lloyd, J.)
January 29, 1981

Dip Kaur
v.
Ch. Constable
of Hants.

DIP KAUR v. CHIEF CONSTABLE FOR HAMPSHIRE

Criminal Law – Theft – Shop – Goods under-priced by mistake – Purchaser aware of mistake, but no deception practised by her – Ownership of goods passing on payment of price.

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On September 1, 1979, the appellant went to a supermarket where among other goods there were displayed racks of shoes, some racks containing shoes which were priced £6.99 and others containing shoes priced £4.99. The appellant took a pair of shoes from a £6.99 rack and then saw that, while one shoe was marked £6.99 the other was marked £4.99. She took the shoes to the cashier, and, while she made no attempt to conceal either of the price labels, she did not draw the cashier's attention to the different pricing. The cashier rang up £4.99 which the appellant paid to her, and the shoes were put in a bag and given to the appellant who left the shop but was stopped by a store detective and later charged with the theft of a pair of shoes valued at £6.99. Justices found as a fact that the appellant believed that in the circumstances it would be wrong to take the shoes out of the shop but that she did so and that she had dishonestly appropriated property belonging to the shop. They convicted the appellant who appealed by way of Case Stated.

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Held (quashing the conviction): no deception was perpetrated by the appellant, no false representation was made by her, and the court should not be astute to find that a theft had taken place where it would be straining language so to hold or where the ordinary person would not regard the defendant's acts, though possibly morally reprehensible, as theft; the prosecution had failed to prove that the contract between the appellant and the shop was void: so far as an ordinary transaction in a supermarket was concerned the intention of the parties under s.18 of the Sale of Goods Act, 1979, was that the ownership of goods should pass on the payment of the price by the customer to the cashier, therefore, *prima facie* when the appellant picked up the shoes to take them home she was already the owner of the shoes; the mistake was the cashier's induced by the wrong marking of the goods, and that was not the sort of mistake which was so fundamental as to destroy the validity of the contract: it was little, if at all, different from a mistake as to quality and a mistake as to quality had never been held to be so fundamental as to avoid a contract.

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Case Stated by Southampton justices.

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S. Alexander for the appellant.
N. Mylne for the respondent.

v

LORD LANE, CJ.: This is an appeal by Case Stated from the justices for the county of Hampshire acting for the petty sessional division of Southampton. It arises in this way. On 18th October, 1979, the respondent ('the prosecutor') preferred a charge against the appellant, alleging that she had stolen a pair of shoes in September, 1979, valued at £6.99, the property of British Home Stores, Ltd.

Lord Lane, CJ

The facts of the alleged theft were these. On 1st September, 1979, the appellant went to British Home Stores at Southampton. Among other goods displayed, there were two racks of shoes, one alongside

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the other. One of the racks contained shoes which were priced at £6.99 and an adjacent rack contained shoes marked at £4.99. The appellant took a pair of shoes from the £6.99 rack and noticed that the pair were not identically marked, one of the shoes being marked £6.99 and the other being marked £4.99. The correct price in fact of the shoes she had selected was £6.99 and the justices found as a fact that the appellant realised this. She did not, as is, regrettably, sometimes done, interfere in any way with the price labels on the shoes. She took the pair of shoes to the check-out. She placed them on the desk in front of the cashier. She made no attempt to conceal either of the price labels, but she hoped that the cashier would select the wrong label and would charge her £4.99 instead of £6.99. She was going to buy the shoes whichever price was demanded. She was lucky. The cashier rang up £4.99. That sum was handed over by the appellant to the cashier, who put it in the till and, all that having happened, the shoes were placed in a bag. They were handed to the appellant who left to go home. The justices found as a fact that

'The appellant believed that it would be wrong to take the shoes out of the shop in these circumstances, but nevertheless she did so, and was accosted by a store detective'.

These proceedings were then launched. It seems from what we have been told, that initially the suspicion was that the appellant had in fact switched the labels on the shoes, but that was not the case.

The justices came to the conclusion that the cashier had no authority to accept, on behalf of the retailer, an offer by the appellant to buy the shoes for £4.99, and, since the appellant knew that this was not the correct price, the apparent contract made at the cash point was void. Secondly, they were of the opinion that the transaction at the cash point did not convey ownership to the appellant, so that on leaving the shop she appropriated property belonging to British Home Stores Ltd. Finally, they concluded, it was right to describe as dishonest the state of mind with which the appellant appropriated the shoes. Accordingly, the justices convicted the appellant on the charge and adjudged that she be fined £25. They ask this court to say:

"whether on the facts found by us we were right in law to conclude that the appellant had dishonestly appropriated property belonging to British Home Stores Ltd. so as to be guilty of theft contrary to s. 1(1) of the Theft Act, 1968."

It is sometimes of advantage to reduce this sort of problem to its ingredients. In order to bring the charge home to the appellant the prosecution had to prove the following matters: first of all, that the appellant acted dishonestly; secondly, that she appropriated the shoes, that is to say she assumed over the shoes the rights of an owner; thirdly, that at that moment those shoes belonged to somebody else; and, fourthly and finally, that she intended permanently to deprive the owner of them. It was found by the justices that she realised that the correct price of the shoes selected by her was £6.99, and that she

believed it would be wrong to take the shoes out of the shop in the circumstances. They came to the conclusion that it was right to describe that as dishonest. She certainly assumed the rights of an owner when, having paid, she took the shoes in the paper bag from the cashier in order to go home. I do not pause to inquire at the moment whether 'appropriation' is an accurate description of what she did. There is no doubt that she intended permanently to deprive the owner of the shoes. So the only matter in issue in this case is whether the prosecution had proved that at the moment she took the shoes out of the shop the ownership of the shoes was still in the shop. If so, the offence was proved; if not, it was not proved.

There is ample authority for the proposition that, so far as supermarkets at any rate are concerned, and in so far as an ordinary transaction in a supermarket is concerned, the intention of the parties, under s.18 of the Sale of Goods Act, 1979, is that the ownership of the goods should pass on payment by the customer of the price to the cashier. It also seems to accord with good sense, and if any authority is needed for that it is to be found in *Lacis v. Cashmarts* (1) *Prima facie*, then, when the appellant picked up the shoes to take them home, she was already the owner of the shoes. They did not belong to somebody else, and she was not intending to deprive the owner of them. But the prosecutor contends that the apparent contract between the shop and the appellant was no contract at all, it was void, and therefore, despite the payment made by the appellant, the ownership of the shoes never passed to the appellant, and the offence was accordingly made out. Counsel for the prosecutor puts it with very great simplicity: she never paid the price, he says, and so there was never any contract at all. He went so far as to suggest that if the appellant had been given 10p too much by way of change and realised that she had been given 10p too much by way of change and had walked out of the shop with the shoes, in those circumstances she would likewise have been guilty of theft of the shoes.

The first thing to note, as indeed the justices did, is that this was not a case where there was any deception at all perpetrated by the appellant. She had not switched the price labels, as happened in *Anderton v. Wish* (2) in which it was held that the property was appropriated when the price tickets were changed. There is no need to comment on that decision, although it has been the subject of adverse criticism. The prosecutor, before the justices, as he did here, relied on the decision in *Hartog v. Colin and Shields* (3).

In that case there had been extensive negotiations between the parties, both oral and in writing, about the sale by the defendants to the plaintiffs of hare skins. All those negotiations had been based on a price of so many pence per piece. The final offer by the defendants to sell was mistakenly quoted as so many pence per pound. Skins worth 10½d each were on this basis being offered at 3½d. On discovering

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(1) [1969] 2 QB 400

(2) [1980] Crim LR 319

(3) [1939] 3 All ER 566

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their obvious mistake, the defendants refused to deliver the skins and the plaintiffs claimed damages. The report of the ex tempore judgment of Singleton, J., is not altogether clear, but the facts are so far divorced from those in the present case that they provide little assistance. We were also referred to *Pilgrim v. Rice-Smith* (4). That was a case where the shop assistant and the customer agreed together to defraud the shop owners, and likewise does not provide any guidance.

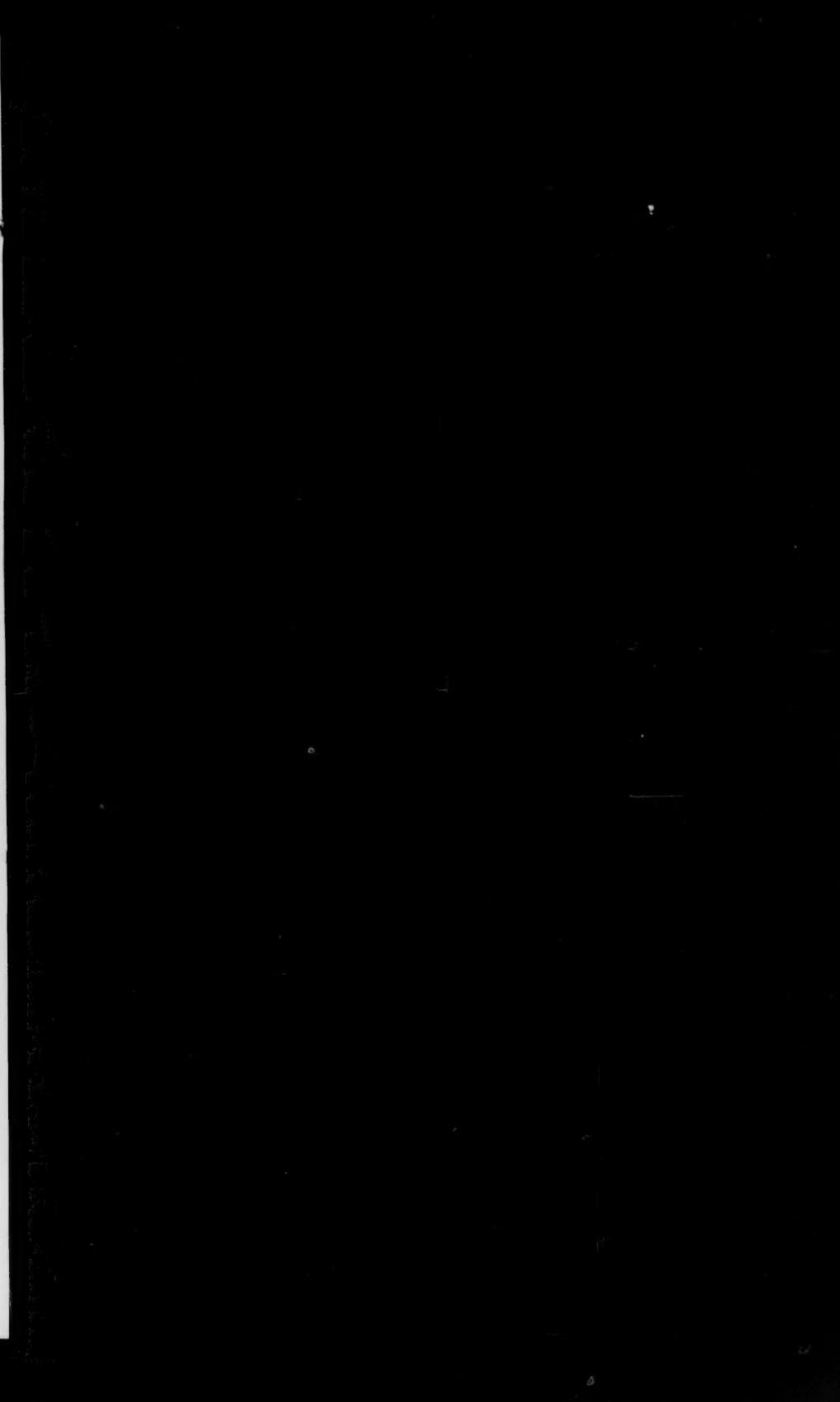
The justices based their conclusion primarily on the fact that the cashier had no authority to accept on behalf of the retailer an offer by the appellant to buy the shoes for £4.99. In my judgment they were in error. The cashier had the authority to charge the price which was marked on the ticket on the goods. The fact that there were two different prices marked and that she chose the lower one does not mean that she was acting without authority. No false representation was made by the purchaser. This is not one of those cases where the true offence was really obtaining by deception under s.15 of the 1968 Act, and where the prosecution should accordingly have alleged that offence, and have resisted the temptation to charge theft. This was either theft or nothing.

It seems to me that the court should not be astute to find that a theft has taken place where it would be straining the language so to hold, or where the ordinary person would not regard the defendant's acts, though possibly morally reprehensible, as theft. In essence here, as I have already said, the problem is: Did the ownership of the shoes pass to the appellant, or was the apparent contract void by reason of mistake? Where questions of mistake are involved there will always be great difficulty in deciding where the line is to be drawn and what renders a contract void and what renders a contract merely voidable. The mistake here was the cashier's, induced by the wrong marking on the goods as to the proper price of those goods. It was not as to the nature of the goods or the identity of the buyer. Speaking for myself, I find it difficult to see how this could be described as the sort of mistake which was so fundamental as to destroy the validity of the contract. It was in essence, as Lloyd, J., pointed out in argument, very little, if at all, different from a mistake as to quality. A mistake as to quality has never been held sufficiently fundamental so as to avoid a contract. The cashier was in effect thinking that these were £4.99 quality shoes, when in fact they were £6.99 quality shoes. Consequently in my judgment the prosecution failed to prove that this alleged contract was void. If it was merely voidable it had certainly not been avoided when the time came for the appellant to pick up the shoes and go.

Happily in this case we are not concerned with the difficulties raised by the decision in *Lawrence v. Comr of Police for the Metropolis* (5) because here the ownership of the goods had passed on payment, and the appropriation was at a later stage, when the shoes were put in the bag and carried away by the appellant. Nor is it necessary to discuss the vexed question whether the true owner, albeit in a voidable

(4) [1977] 2 All ER 658

(5) 135 JP 481; [1971] 2 All ER 1253; [1972] AC 626





contract, can properly be said to 'appropriate' his own property or to 'assume the rights of an owner' over it when he takes possession of it. At first sight those words would appear to imply some action which was adverse to the interests of another. Nor do I pause to consider whether the justices' finding of dishonesty on the part of the appellant can be justified — whether in other words this is the sort of dishonesty which is envisaged by the Theft Act, 1968. I should also add, for the sake of completeness, that s.5(4) of the 1968 Act has no application here, because the appellant was not under an obligation to make restitution of the shoes at the material time.

For those various reasons I would allow this appeal and would answer the justices' question, namely, whether on the facts found by them they were right in law to conclude as they did, in the negative. It follows that the conviction will be quashed.

LLOYD J. I agree.

Conviction quashed.

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Solicitors: *Plumer Price & Beswick, Southampton; R N Bourne, Winchester.*

Reported by G.F.L. Bridgman, Esq., Barrister.

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*Child – Care – Local authority – Access – Decision by local authority
– Review by court.*

In 1980 a local authority obtained a care order pursuant to s.1(2)(a) and (3) of the Children and Young Persons Act, 1969, in respect of a male child who was placed with foster parents, his mother being allowed weekly access. After three months the local authority formed the view that rehabilitation of the mother and the child was not in the child's best interest and they informed the mother that thenceforth only monthly supervised access would be allowed, that the access was to take place at a day nursery, and that it was to be limited to one hour. The mother objected to these restrictions on her access as being "wholly unreasonable and arbitrary" and sought an order that the child should be made a ward of court, but Balcombe, J., in the Family Division of the High Court, decided that he had no jurisdiction to continue the wardship sought by the mother and so discharged the wardship proceedings which she had begun. The mother appealed to the House of Lords under s.12 of the Administration of Justices Act, 1969.

Held (dismissing the appeal): the court had no power to review the decision of the local authority as to access, which was undoubtedly within the discretionary powers of the local authority, and to substitute its own opinion on that matter; Parliament had by statute entrusted to local authorities the powers and duty to make decisions as to the welfare of children without any reservation of reviewing power to the court.

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Per Lord Roskill: The undoubtedly wardship jurisdiction must not be exercised so as to interfere with the day to day administration by local authorities of the far-ranging statutory code which entrusted the care of deprived children to local authorities.

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Appeal against a decision of Balcombe, J., in the Family Division of the High Court.

*M. Morland QC and J. Daley for the mother.
J. Hugill QC and M. Hedley for the local authority.*

Their Lordships took time for consideration.

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20th May, 1981. The following opinions were delivered.

Lord Wilberforce

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LORD WILBERFORCE. My Lords, this appeal comes to this House in accordance with s.12 of the Administration of Justice Act, 1969, from a decision of Balcombe, J., in the Family Division of the High Court. He decided that he had no jurisdiction to continue the wardship sought by the mother of a young boy who was in the care of the respondent local authority. The child was the subject of a care order made by a juvenile court in Liverpool on 10th March, 1980, under the Children and Young Persons Act, 1969, as the result of which he was placed with foster parents with whom he now resides. The mother, though formally seeking the care and control of the child, is not asking

that this should immediately be given to her, but she does wish to oppose restrictions on her access to him imposed by the council, they having taken the view that 'rehabilitation' (which means restoration to his mother's care) was not in the child's best interest and consequently that regular access by the mother was not desirable. The father takes no part in these proceedings. The learned judge decided as he did following two decisions of the Court of Appeal, namely *Re M* (1) (approving *Re A B* (2) and *Re W* (3). The first case has been consistently followed. The mother thus invites the House to overrule a consistent line of authority over a period of twenty years. The main contention is that, the welfare of the child being the 'first and paramount consideration' (under the Guardianship of Infants Act, 1925, s.1) the High Court has an overriding power and duty to apply this fundamental principle, and that this jurisdiction is not to be cut down, or considered as diminished, by the legislation which had been passed as to the care of infants or minors.

At the present time, responsibility for jurisdiction over minors is divided between a large number of courts and authorities and is regulated by a number of Acts of Parliament as well as by principles of equity and law. There are many different strands which it is difficult to disentangle, and any statement of principle is liable to be complicated or confused by exception and qualifications. I do not therefore attempt to survey the whole field. The principles which govern the present case, however, are comparatively simple to state.

The welfare of the child has always been the yardstick by which courts of equity, exercising their ancient jurisdiction over minors (or infants as they were historically described), were guided. But naturally the considerations by which they were guided in reaching their decisions as to a child's welfare, or his best interests, have varied. This was particularly so in relation to the claims of parents. I need not repeat in this context the very full historical analysis presented by the speeches in *J v. C* (4) showing the progressive evolution of the present law through the Victorian era to ours. This culminated in the passing of the Guardianship of Infants Act, 1925, s.1, with its statement that in any proceeding involving the custody or upbringing of an infant the court should regard the welfare of the infant as the first and paramount consideration. No doubt this section was in the main a 'sex equality' enactment putting the mother on an equality with the father. No doubt also it applied generally beyond cases of disputes between parents, but in so far as it did so it was little more than a reminder, unnecessary to the Chancery courts which had always acted on this principle, as to the ultimate test to be applied. I shall not take time by commenting on the word 'paramount', clearly taken from the opinion of Viscount Cave, L.C., in *Ward v. Laverty* (5) where he related this test to 'rules which are now well accepted, so clearly not intended

- (1) 125 JP 278; [1961] Ch 328
- (2) 118 JP 318; [1954] 2 QB 385
- (3) [1980] Fam. 60
- (4) [1970] AC 668
- (5) [1925] AC 101

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as a new or even talismanic word'. The speeches in *J v. C* (4) provide authoritative guidance which I should not wish to repeat or to gloss. The point which I desire to emphasise is that, against a background of continual social changes, within and beyond the family, the object of intervention by the courts, whether the courts of Chancery, or their predecessor the Court of Wards and Liveries, or their present successors, the courts of the Family Division of the High Court, is to promote the welfare of the child.

I have not available any reliable statistics as to the number of children whose cases, in the nineteenth century, or even before the 1939-45 war, had to be considered by the courts, including county courts and magistrates' courts. What is undoubted is that the number of those in need of some supervision or assistance is now very large: 90,000 was the figure given us for the number of children in care, of which over 65,000 are cases where the local authority have full responsibility under care orders or parental rights resolutions. The respondent authority alone has 1,500 such cases. It is obvious that this situation called for a large delegation of power to local authorities and a large measure of discretion for them, and this had been conferred by the (consolidating) Child Care Act 1980 and by the surviving portion of the Children and Young Persons Act 1969. When one asks what is the principle by which these authorities are to be guided there can only be one general answer: the welfare of the child. I add the word 'general' in order to leave room for the jurisdiction exercisable for the protection of the public. As regards children in voluntary care, this is quite explicitly stated in the Child Care Act, 1980, ss.1 and 2 (I need not retrace the earlier enactments); as regards those the subject of care orders this appears no less clearly from the Children and Young Persons Act, 1969, s.24; as regards juvenile courts the same is true: see *Re H* (6). To the argument, therefore, that the High Court has a special and overriding jurisdiction because only there can the welfare of the child be assigned its proper place, the answer is clear: that there is no other principle on which any court or administrative body can (with the exception of public protection cases, and even there considerations must be mixed) act than that which is best for the child's welfare. It must, however, be borne in mind that, whereas the duties and powers of local authorities and of juvenile courts are defined and limited by statute, there is no similar limitation on those of the High Court.

This leads to the next and decisive question. Given that both the High Court and the local authority have responsibilities for the welfare of the child, what is the relationship or dividing line, between them? I think that there is no doubt that the appellant, the child's mother, is arguing for a general reviewing power in the court over the local authority's discretionary decision; she is, in reality, asking the court to review the respondents' decision as to access and to substitute its own opinion on that matter. Access itself is undoubtedly a matter within the discretionary power of the local authority. In my opinion the court has no such reviewing power. Parliament has by statute

(4) [1970] AC 668

(6) 142 JP 474; [1978] Fam. 65

entrusted to the local authority the power and duty to make decisions as to the welfare of children without any reservation of reviewing power to the court. There are, indeed, certain limited rights of appeal as to the care order itself: under s.2(12) of the 1969 Act there is an appeal to the Crown Court against the care order; the appellant did not exercise this right and is now long out of time. Or the appellant could apply to the juvenile court under s.21 of the 1969 Act to discharge the care order or to vary it; this she has not done, and any such application would not be likely to succeed. Furthermore, if the facts so permitted, she could apply to the High Court for judicial review of the care order or the local authority's actions under it; there is no suggestion of any ground on which this would be possible in the present case. Nowhere is there any suggestion in the legislation that the High Court was to be left with a reviewing power as to the merits of local authorities' decisions.

It was suggested that, as the local authority is put effectively in the position of the natural parent (see s.24(2) of the 1969 Act), the High Court must have the same power in the interest of the infant to review and control its actions, as it undoubtedly has over those of the natural parent. But I can see no parallel between the responsibilities of a natural parent and those entrusted by Parliament by statute to a public authority possessed of the necessary administrative apparatus to form and to carry out, if necessary against the wishes of the natural parent, its discretionary decisions. In my opinion Parliament has marked out an area in which, subject to the enacted limitations and safeguards, decisions for the child's welfare are removed from the parents and from supervision by the courts.

This is not to say that the inherent jurisdiction of the High Court is taken away. Any child, whether under care or not, can be made a ward of court by the procedure of s.9(2) of the Law Reform (Miscellaneous Provisions) Act 1949. In cases (and the present is an example) where the court perceives that the action sought of it is within the sphere of discretion of the local authority, it will make no order and the wardship will lapse. But in some instances there may be an area of concern to which the powers of the local authority, limited as they are by statute, do not extend. Sometimes the local authority itself may invite the supplementary assistance of the court. Then the wardship may be continued with a view to action by the court. The court's general inherent power is always available to fill gaps or to supplement the powers of the local authority; what it will not do (except by way of judicial review where appropriate) is to supervise the exercise of discretion within the field committed by statute to the local authority.

Because they conform to those principles of law which I have endeavoured to state, I am of the opinion that *Re M* (1) and *Re W* (3) were correctly decided. Indeed, the principles which I have endeavoured to state were clearly laid down by Lord Evershed, M.R., in *Re M* (1) in terms which have guided the courts ever since. In-

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tervening cases have been fully discussed by my noble and learned friend Lord Roskill and I am more than content to accept his analysis. As regards *Re H* (6), this is a type of case very familiar to anyone concerned with the insoluble syndromes of infancy cases in which the decision, made in most difficult circumstances, appears a wise one but, if taken to appeal, might be hard to sustain, at least on the grounds assigned. I have no inclination to criticise such decisions even if they make doubtful precedents. I prefer to say no more on it. In this case the judge, in my opinion, was clearly right and the appeal must be dismissed.

LORD DIPLOCK: I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Wilberforce, with which I agree. I too would, therefore, dismiss the appeal.

LORD FRASER OF TULLYBELTON: I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Wilberforce and Lord Roskill. I agree with them, and, for the reasons stated by them, I would dismiss this appeal.

LORD KEITH OF KINKEL: Having had the benefit of reading in draft the speeches prepared by my noble and learned friends Lord Wilberforce and Lord Roskill, I agree that, for the reasons there stated, the appeal should be dismissed.

LORD ROSKILL: This appeal from an order of Balcombe, J., made in Liverpool on 14th October, 1980, comes directly to your Lordships' House pursuant to the provisions of s.12 of the Administration of Justice Act, 1969, the learned judge having granted the appropriate certificate and leave having been subsequently given by your Lordships' House. By his order the learned judge discharged wardship proceedings which the appellant (whom I shall call 'the mother') had begun on 29th August, 1980, pursuant to s.9 of the Law Reform (Miscellaneous Provisions) Act, 1949. Those proceedings related to her son, to whom in order to avoid further identification I shall refer as K, then some two years of age and now 2½. The first respondent to that summons were the present respondents, the Liverpool City Council ('the local authority'). The second respondent was K's father who has not appeared or taken part in these proceedings.

My Lords, it cannot be doubted that the learned judge was bound by authorities of long standing to discharge the wardship proceedings which the mother had begun. Those authorities start with *Re A B* (2). That decision was expressly approved by the Court of Appeal in *Re M* (1). It has been repeatedly followed both in the Court of Appeal and by judges of first instance in the ensuing twenty years, as for example in *Re T (AJJ)* (7), and most recently in *Re W* (3). The effect of those

- (1) 125 JP 278; [1961] Ch 328
- (2) 118 JP 318; [1954] 2 QB 385
- (3) [1980] Fam. 60
- (6) 142 JP 474; [1978] Fam. 65
- (7) 134 JP 611; [1970] Ch 688

and other decisions is clear and is well summarised by the learned judge in his judgment in the present case:

'The court will not, indeed should not, exercise its wardship jurisdiction when what is sought to be done is to question the manner in which a local authority in whose favour a care order has been made is exercising its statutory jurisdiction.'

But your Lordships' House has not previously considered the problems arising from the coexistence of the wardship jurisdiction of the court and the statutory jurisdiction of local authorities in relation to the care and control of children which is exercised by those authorities. It was to enable that consideration to be given that leave to appeal was given in the instant case.

The relevant facts can be shortly stated. On 10th March, 1980 the local authority obtained a care order pursuant to s.1(2)(a) and (3) of the Children and Young Persons Act, 1969, in respect of K. He was then placed with foster parents but the mother was allowed weekly access. That access continued until 16th June, 1980, when the mother was told that henceforth only monthly supervised access would be allowed. That access was to take place at a day nursery and was to be limited to one hour. The local authority's stated reason was that the 'rehabilitation' of the mother and K was not in K's best interest. Accordingly there was no point in maintaining regular access when no such 'rehabilitation' was still planned. The local authority refused to reconsider its decision and it was with the intention of challenging that decision as 'wholly unreasonable' and 'arbitrary' that the present wardship proceedings were begun. The summons issued by the mother sought from the court not only an order for defined access but also care and control of K. The learned judge, rightly in my view, declined to express any view on the facts, being of the opinion as already stated that he was bound by authority to discharge the wardship proceedings.

An attempt was made on behalf of the mother before the learned judge to challenge the decision of the local authority on the basis of the well-known decision of the Court of Appeal in *Associated Provincial Picture Houses Ltd v. Wednesbury Corp* (8). There was no evidence which could possibly justify this attempted challenge and the learned judge rightly rejected it. This challenge was not renewed in argument before your Lordships' House.

Counsel for the mother rightly accepted that the mother's appeal could not succeed unless your Lordships were prepared to overrule the long-standing decisions to which I have already referred of *Re A B* (2) and *Re M* (1), and he invited your Lordships to do so. His basic challenge to those decisions was that each was wrong in so far as it asserted that the wardship jurisdiction of the court was curtailed or restricted by the relevant legislation, at the time of the former case the Children Act,

- (1) 125 JP 278; [1961] Ch 328
(2) 118 JP 318; [1954] 2 QB 385
(3) [1980] Fam. 60
(8) 112 JP 55; [1948] 1 KB 223

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1948, and at the time of the latter the 1969 Act, both of which statutes had been later amended by the Children Act, 1975. Those cases and also *Re T (AJJ)* (7) had been decided before the decision of your Lordships' House in *J v. C* (4) which authoritatively determined that under the Guardianship of Infants Act, 1925, since replaced by the Guardianship of Minors Act, 1971, as later amended, it was the welfare of the child which was the first and paramount consideration, a statutory provision seemingly ignored, so counsel claimed, both in the arguments and in the judgments in those three cases to which I have just referred. Once it was accepted that the welfare of the child was the paramount consideration the court should freely exercise its wardship jurisdiction in any case where it could be shown that the decision taken by the local authority did not satisfy what the court might think was in the best interest of the welfare of the child concerned.

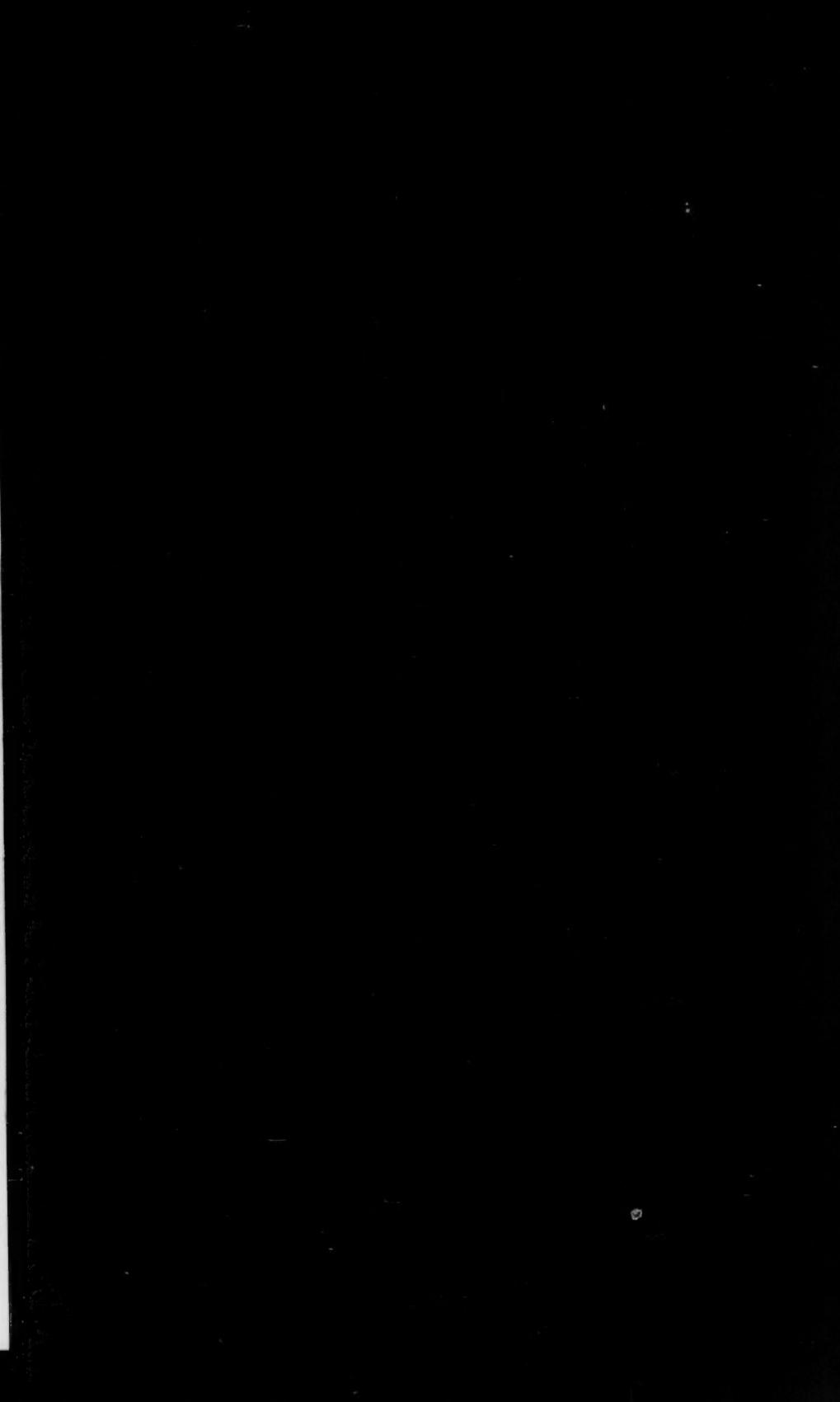
Though a right of appeal to quarter sessions, now to the Crown Court, had been given to a child under s.2(12) of the 1969 Act against (subject to a single exception) an order made under s.1 of that Act, and a wholly new right of appeal to the High Court was given by s.58 of the 1975 Act, which added s.4A to the 1948 Act so as to permit appeals to the High Court from a juvenile court which had made or refused to make orders under s.2(5) or s.4(3) of that Act, no statutory right of appeal had even been accorded to a person aggrieved by the exercise of the day-to-day performance of its statutory duties in relation to child care by a local authority. It was therefore essential, so counsel for the mother submitted, to the welfare of the child that the court should retain and be prepared to exercise its wardship jurisdiction so as to ensure that the child's welfare always remained the paramount consideration. Counsel for the mother also pointed to the powers given to the court under s.7(2) of the Family Law Reform Act 1969 which enabled the court in the exercise of wardship jurisdiction to commit a child to the care of a local authority and to the encouragement which in recent years had been given by the courts and particularly by the Court of Appeal to local authorities themselves to invoke the wardship jurisdiction of the court so as to supplement their own sometimes inadequate statutory powers by adding to them the powers which the court could exercise in its own jurisdiction. It was, counsel for the mother contended, illogical that when in these respects the two jurisdictions were complementary there should be objection to the wardship jurisdiction being made available not as (he claimed) a means of appeal against or review of the day-to-day administrative decisions of the local authority but as a means of ensuring that the welfare of the child was always the paramount consideration in reaching whatever decision was taken in accordance with the requirements of the 1925 and 1971 Acts to which I have already referred.

I do not think it necessary to review the authorities on the inter-relationship between prerogative and statutory powers. The basic principles were authoritatively determined by your Lordships' House in *Attorney General v. De Keyser's Royal Hotel Ltd* (9): see especially

(4) [1970] AC 668

(7) 134 JP 611; [1970] Ch 688

(9) [1920] AC 508





the speech of Lord Sumner. I do not doubt that the wardship jurisdiction of the court is not extinguished by the existence of the legislation regarding the care and control of deprived children, a phrase I use to include children whose parents have for some reason failed to discharge their parental duties towards them. I am not aware of any decision which suggests otherwise. It is helpful to examine the unsuccessful submissions in *Re A B* (2) of JE Simon, Q.C., for the foster parents and the successful submissions of R J Parker for the local authority. Mr Parker argued that

'the court's powers as *parens patriae* are limited by the Children Act, 1948, by which Parliament has committed, in certain cases, the task and the right of the supervision of the welfare of children to local authorities'.

It was this argument which Lord Goddard, C.J., was accepting. Indeed, Donovan, J., concurring on this point, said:

'Thus far, at any rate, Parliament has entrusted the welfare of the child to the local authority, and to that extent the prerogative right to secure the welfare of the child is, in my view, by necessary implication, restricted. Accordingly . . . the court cannot intervene simply because it differs from the local authority as to what is best for the child.'

It was this view which found favour with the Court of Appeal in *Re M* (1). Lord Evershed, M.R., with whom Upjohn and Pearson, L.J.J., expressly concurred, stated his first two conclusions thus:

(i) The prerogative right of the Queen as *parens patriae* in relation to infants within the realm is not for all purposes ousted or abrogated as the result of the exercise of the duties and powers by local authorities under the Children Act, 1948: in particular the power to make an infant a ward of court by invocation of s.9 of the Act of 1949 is unaffected. (ii) But even where a child is made a ward of court by virtue of the Act of 1949, the judge in whom the prerogative power is vested will, acting on familiar principles, not exercise control in relation to duties or discretions clearly vested by statute in the local authority, and may, therefore, and in a case such as the present normally will, order that the child cease to be a ward of court.'

The statutory codes which existed in 1958 and in 1961 have been elaborated and extended and amended several times since these decisions as the social needs of our society have changed and, unhappily, the number of deprived children in the care of local authorities has tragically increased. It cannot possibly be said that the massive volume of legislation since 1961 culminating in the Child Care Act, 1980, a

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(1) 125 JP 278; [1961] Ch 328

(2) 118 JP 318; [1954] 2 QB 385

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consolidating Act which, though repealing the whole of the 1948 Act, left intact the early part of the 1969 Act, has lessened the responsibilities of local authorities. This hardly suggests an intention by Parliament to restrict the scope of the statutory control by local authorities of child welfare in favour of the use by the courts of the prerogative wardship jurisdiction. On the contrary, the plain intention of this legislation is to secure the continued expansion of that statutory control. I do not think that the language of s.1 of the Guardianship of Infants Act, 1925, and of its statutory successor in any way points in a contrary direction. The former statute, as its preamble shows, was largely designed to secure equality of rights as between father and mother in relation to their children and making the welfare of those children paramount in relation to those two henceforth equal interests. Nor do I think that the emphasis laid on that section in your Lordships' House in *J v. C* (4) casts any doubt on the correctness of the several earlier decisions to which I have already referred.

I am of the clear opinion that, while prerogative jurisdiction of the court in wardship cases remains, the exercise of that jurisdiction has been and must continue to be treated as circumscribed by the existence of the far-ranging statutory code which entrusts the care and control of deprived children to local authorities. It follows that the undoubted wardship jurisdiction must not be exercised so as to interfere with the day-to-day administration by local authorities of that statutory control. To say that is not to suggest that local authorities are immune from judicial control: in an appropriate case, as Lord Evershed himself said in *Re M* (1), the *Wendesbury* (8) principle is available. The remedy of judicial review under RSC Ord 53 is also available in an appropriate case. Moreover, there are the specific, if limited, rights of appeal to which I have already drawn attention.

I think this conclusion is strongly reinforced by the consideration that, though the law as laid down by the courts has been clear since 1961 when *Re M* (1) was decided and though there have been many legislative changes since that date, noticeably in 1969 and again in 1975 when the new right of appeal to the High Court already mentioned was first created, no right of appeal or review such as the mother in effect now seeks to achieve by invocation of the wardship jurisdiction of the court has ever been accorded by Parliament. The inference that I would draw from that fact is that Parliament was satisfied with the restriction on the remedies available to a person aggrieved by a discretionary administrative decision of the local authority, declared by the cases to which I have referred, and decided to leave the law as thus laid down unaffected.

Much reliance on the mother's behalf was placed on the decision of the Court of Appeal affirming Balcombe J in *Re H* (6), where that court, in agreement with the learned judge, exercised its wardship

(1) 125 JP 278; [1961] Ch 328

(4) [1970] AC 668

(6) 142 JP 474; [1978] Fam. 65

(8) 112 JP 55; [1948] 1 KB 223

jurisdiction so as to enable the Pakistani parents of a child in respect of whom a care order had been made under s.1 of the 1969 Act to remove that child from this country, notwithstanding the existence of that care order. The juvenile court concerned was precluded from discharging that care order because of the amendment to the 1969 Act effected by the introduction into that Act of s.21(2A) by the 1975 Act. The judgment of the Court of Appeal delivered by Ormrod, LJ., contains (if I may respectfully say so) a most valuable review of all the relevant statutory provisions and judicial decisions in this field as they stood at the date of that decision. Moreover the judgment drew attention to the anomalies which exist between those cases where a statutory right of appeal existed and those where it did not. As I have already said, however unfortunate it may seem that these anomalies exist, the recent legislative history suggests that their retention has not been accidental. In *Re H* (6) the Court of Appeal felt able to exercise wardship jurisdiction because 'the challenge is directed, not to the exercise of a discretionary power, but to the source of that power'. Since it is the exercise of a discretionary administrative power of which the mother now seeks to complain in the instant case, the decision in *Re H* (6) is of no assistance to her. But I confess, with all respect to the judgment of the Court of Appeal, I find the suggested distinction by Ormrod, LJ., of *Re M* (1) and the other cases, which he himself described as 'slim', difficult to justify in principle. The decision in *Re H* (6) is, if I may respectfully say so, obviously sensible: while acknowledging the possibility of some risk to the child, this was the lesser of the only two possible courses which it was open to a court to take, the other being to leave the child behind in this country after its parents had returned to Pakistan. I venture to think that the decision can perhaps be better supported on the ground that the wardship jurisdiction of the court could properly be invoked in addition to the statutory jurisdiction of the local authority because it was only in this way that the result which was best in the paramount interest of the child could be achieved, the local authority and juvenile court being unable within the limits of their powers to achieve that result.

Lane, J., in *Re B* (10) drew attention to the positive advantages which could flow from the invocation of wardship jurisdiction in cases of child abuse from the point of view of local authorities. Though the learned judge refused the grandmother's application for care and control of the child in the wardship proceedings which the grandmother had begun, she continued those proceedings so that if required the local authority could apply for an injunction restraining the child's undesirable stepfather from any contact or attempted contact with the child. A local authority may often be powerless to stop attempted interference by third parties. The exercise of wardship jurisdiction affords a simple method of attaining a result much to be desired in such cases.

- (1) 125 JP 278; [1961] Ch 328
- (6) 142 JP 474; [1978] Fam. 65
- (10) 130 JP 87; [1975] Fam. 36

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Re D (11) affords another illustration of the utility of wardship jurisdiction which in that case was invoked by the local authority and accepted by Dunn, J. But, with respect, I cannot agree with the learned judge's suggested distinction between the welfare of the child always being paramount in wardship proceedings but not in cases under the 1969 Act. It is true that the language of the relevant parts of the 1969 and the 1925 Acts is somewhat different, but I agree with the comment of Ormrod, L.J., on this statement in *Re H* (6) because, as the learned lord justice there said, juvenile courts always do act in the best interests of the child so far as their powers permit.

In the result I am clearly of the opinion that the earlier cases to which I have referred were rightly decided, and should now be affirmed by your Lordships' House. On any view, had I felt doubts on this matter, which I do not, I would have been reluctant to suggest to your Lordships that those cases should, after twenty years and more, be disturbed, for they have been acted on many times both in the Court of Appeal and by judges at first instance. But the wardship jurisdiction of the court is never extinguished merely because the child is in the care of a local authority. Its exercise must, however, be closely circumscribed. I do not think that any useful purpose would be served by your Lordships attempting to define the limits within which that circumscription must exist, for cases of this class vary infinitely. Clearly the jurisdiction can be invoked by a local authority when its own powers are inadequate to make the welfare of the child paramount or when it is necessary to this end to take action against some stranger. But the courts must not, in purported exercise of wardship jurisdiction, interfere with those matters which Parliament has decided are within the province of a local authority to whom the care and control of a child has been entrusted pursuant to statutory provisions. That is what the mother seeks in the present case. I think the learned judge was entirely right in the order he made and I would dismiss the appeal and answer the certified question in accordance with what I have already said.

Appeal dismissed.

Solicitors: *Bulcraig & Davis*, for *E Rex Makin & Co*, Liverpool;
Howlett & Clarke, Cree & Co, for *K M Egan*, Liverpool.

Reported by G.F.L. Bridgman, Esq., Barrister.

- (6) 142 JP 474; [1978] Fam. 65
(11) [1976] Fam. 185

COURT OF APPEAL
(Lord Lane, C.J., Ormrod, L.J., and Smith, J.)
March 17, 1981

R. v. Steel
R. v. Malcherek

Court of Appeal

R. v. STEEL. R. v. MALCHEREK

Criminal Law – Murder – Cause of death – Evidence of violence by person charged causing grave injuries – Use of life-supporting apparatus in hospital – Doctors satisfied that victim dead – Life-support apparatus disconnected.

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On October 10, 1977, a girl, while walking to work, was attacked, her head being battered with a 50lb stone. When she was taken to hospital she was found to have multiple fractures of the skull, severe brain damage, and other injuries. She was put on a ventilator, a life-support machine. Two days later the doctors who were attending her, after making a number of tests, decided that she was no longer alive and the ventilator was switched off. The applicant, S, was convicted of murdering her and he appealed for leave to appeal against his conviction.

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In the case of the appellant, M, he was convicted of the murder of his wife by stabbing her. She too was taken to a hospital and was connected to a ventilator: her condition deteriorated and after tests had been carried out it was decided that she showed no sign of life and that the ventilator should be disconnected. The appellant appealed against his conviction.

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In both cases it was submitted that the judge at the trial was wrong in withdrawing the issue of causation from the jury who should have been allowed to consider whether the cause of death was the action of the doctors in disconnecting the ventilators and not the actions of the assailants.

Held: in both cases it was clear that the initial assault was the cause of the grave injuries suffered by the victims and there was no evidence in either case that after the life-support had been disconnected the original injuries were other than a continuing, operating, and substantial cause of the death of the victims; the discontinuance of treatment did not break the chain of causation between the injuries and the death; the application was refused and the appeal was dismissed.

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Per Lord Lane, C.J.: It is somewhat bizarre to suggest that where a doctor tries his conscientious best to save the life of a patient brought to hospital in extremis, skilfully using sophisticated methods, drugs and machinery to do so, but fails in his attempt and therefore discontinues the treatment, he can be said to have caused the death of the patient.

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Application by Anthony Steel for leave to appeal against his conviction at Leeds Crown Court of the murder of Carol Wilkinson, and Appeal by Richard Tadeusz Malcherek against his conviction at Winchester Crown Court of the murder of his wife.

*W. Steer, Q.C., and J.S.H. Stewart for Steel.
T.G. Field-Fisher, Q.C., and A. Bailey for Malcherek.
J.J. Smyth, Q.C., D. Gordon and J.M. Meredith for the Crown.*

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LORD LANE, C.J., delivered the following judgment of the court: These two cases, one an appeal and the other an application, raise similar points and it was accordingly thought convenient that they should be dealt with together. The facts of the two cases are as follows.

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I start with the applicant Steel. This man, on 13th December, 1979, in the Crown Court at Leeds before Boreham, J., and a jury, was convicted of murder, and he now applies to this court for leave to appeal against conviction and also to call certain witnesses, two medical men.

The victim of the attack was a girl called Carol Wilkinson. She was twenty years of age at the time. She lived in the Ravenscliffe area of Bradford with her fiance and worked at a bakery which was situated about half a mile away from her home. Steel was then aged 21. He lived not far away in another house on the same Ravenscliffe estate. He was sharing accommodation with a girl named Pamela Ward, but at the same time he was carrying on an association with another girl whom he eventually married. Steel was employed by the local council as a gardener. On 10th October, 1977, at about 9 am, Carol Wilkinson was walking to work from her home to the bakery. At some time that morning, between about 9.00 and 9.30, she was savagely attacked by someone who stripped off the greater part of her clothing, and then battered her about the head with a 50 lb stone which was found nearby. She was found shortly afterwards, in a field by the road, unconscious. She was taken as rapidly as could be to hospital. She had multiple fractures of the skull and severe brain damage as well as a broken arm and other superficial injuries which need not concern us. She was put almost immediately on a life support machine in the shape of a ventilator. On 12th October the medical team in whose charge she was, after a number of tests, came to the conclusion that her brain had ceased to function and that, accordingly, the ventilator was in effect operating on a lifeless body. The life support machine was switched off and all bodily functions ceased shortly afterwards.

The judge withdrew the issue of causation from the jury on the fifth day of the trial, and the jury were accordingly left to decide the issue, hotly contested, whether they were sure that it was Steel who had been the girl's assailant. The case for the Crown depended very largely, though not entirely, on admissions which were said to have been made by Steel, both orally and in writing, to the police during the time in April, 1979, when he was being questioned about the events of 10th October, 1977. Part of the grounds of appeal are based on the allegation that those admissions were wrongly allowed to go before the jury by the judge when the admissions had, it is said, been extracted from Steel by threats or by oppression or possibly in contravention of the Judges' Rules. That aspect of the application has been left in abeyance until the problem of causation, with which we are concerned now, has been concluded.

So far as that issue is concerned, namely the issue of causation, the following facts are material. On admission to the casualty department of the Bradford Royal Infirmary at about 10.15 am on Monday, 10th October, Carol was seen by a Dr. Nevelos, who found her to be deeply unconscious with no motor activity, her eyes open and the pupils fixed. She was breathing only with the aid of the ventilator. An hour later she was admitted to the intensive care unit of the Royal Infirmary and during the whole of that day she remained deeply unconscious and unresponsive. At 10.00 pm the consultant neuro-surgeon, a Mr. Price, examined her. He found her to be in a deep coma, unresponsive

to any stimulus. He carried out a test for electrical activity in the brain which proved negative. The total absence of any motor activity since the girl had been admitted to hospital and the early fixation of the pupils, which I have already mentioned, led him to the conclusion that there had been a devastating impact injury to the brain. The cerebral function monitor showed no activity. Her eyes were too occluded, so it is said, to allow any caloric testing. The suggestion was made by Mr. Price that her temperature should be raised and that if by the morning her cerebral function remained as it had been up to date, namely zero, they should declare her brain to be dead. In fact, shortly after 10.00 am the next day, a cerebral blood flow test was carried out which indicated that there was no blood circulating in the brain. Several electroencephalogram tests were made during that day. None of them had any positive result. On Wednesday, 12th October, two days after the injuries had been inflicted, another electroencephalogram test was made in the morning and another at 6.00 pm but none of these tests showed any signs of electrical activity at all. After that there was a consultation between the doctors who were in charge of the patient, and it was agreed among them that the continued use of the ventilator was without any purpose. At 6.15 pm the patient was withdrawn from the ventilator, and at 6.40 pm she was declared to be dead. There is an indication, though we are told it was not part of the evidence at the trial, that on post-mortem 50 minutes later it was found that her brain was already in the process of decomposition. Much of the cross-examination of the medical men was taken up with suggestions that they had failed to conform to certain criteria which have been laid down by the Royal Medical College on the subject of the ascertainment of brain death.

The matter which counsel for Steel invites this court to take into consideration as possibly differentiating the case of Steel from that of Malcherek is that he says that two of the suggested tests were not carried out properly, namely, the corneal reflex test and the vestibulo-ocular reflex test. The corneal reflex test consists of touching the cornea of the eye with a piece of cotton wool to see if that creates any reaction in the patient and, as we understand it, the vestibulo-ocular reflex test consists of putting ice cold water into the aperture of the ear, again to see if that produces any reflex in the patient. Reasons were given for neither of those tests having been carried out.

We now turn to the facts in the case of Malcherek. On 12th November, 1979, this time in the Crown Court at Winchester before Willis J and a jury, Malcherek was convicted of murder. He appeals against the conviction by leave of the single judge. The victim was Christian Malcherek, his wife, who was then aged 32. It seems that in November 1978 she left Malcherek in order to go and live with her daughters at Poole. There was a non-molestation order in force, directed at Malcherek, but on the evening of 26th March 1979 he went to her flat where she was living. There was a quarrel and, to cut a long story short, he stabbed his wife nine times with a kitchen knife. One of the stabs resulted in a deep penetrating wound to Mrs. Malcherek's abdomen. She was taken to Poole General Hospital and there was preliminary treatment in order to try to rectify her very low blood pressure, which was ascertained

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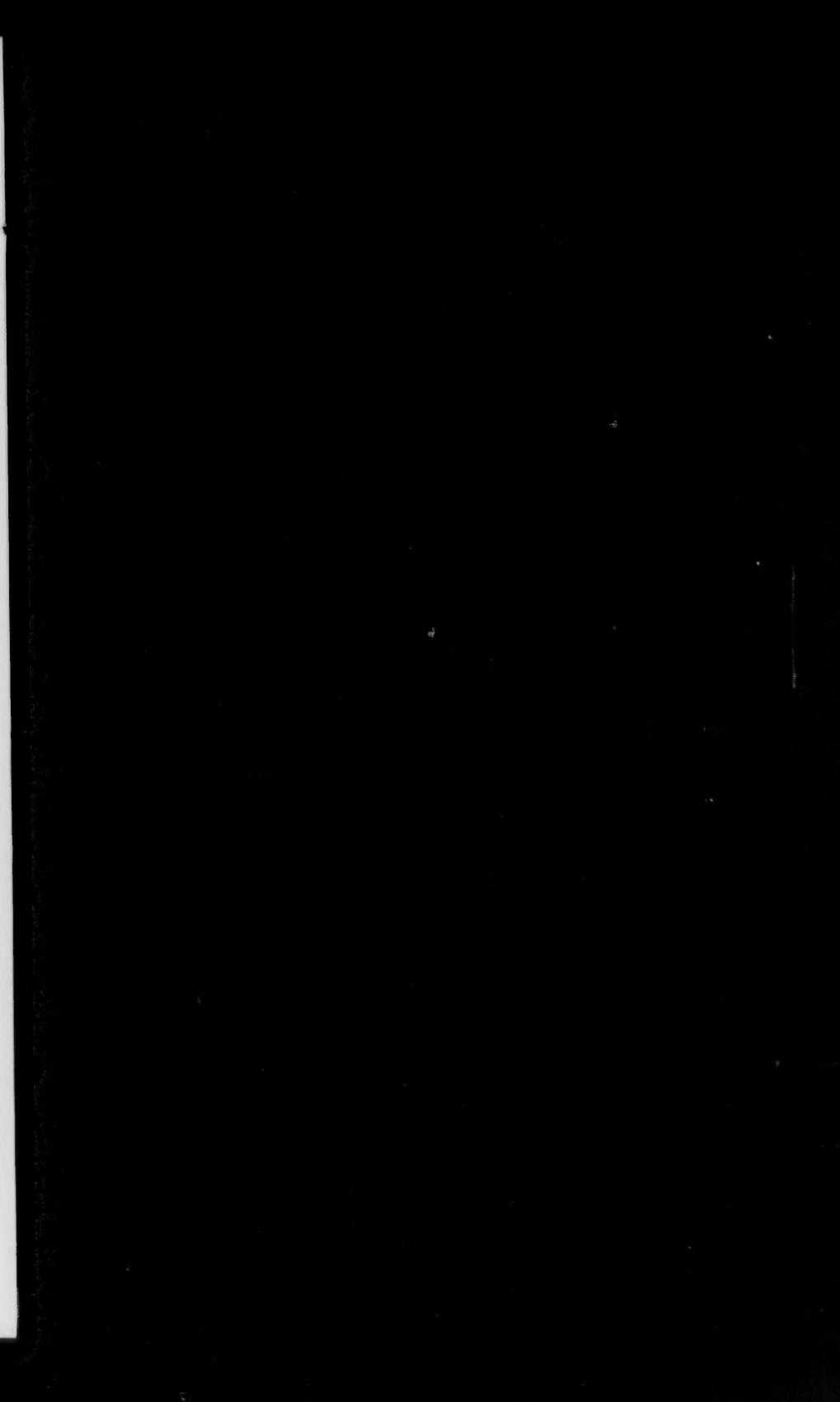
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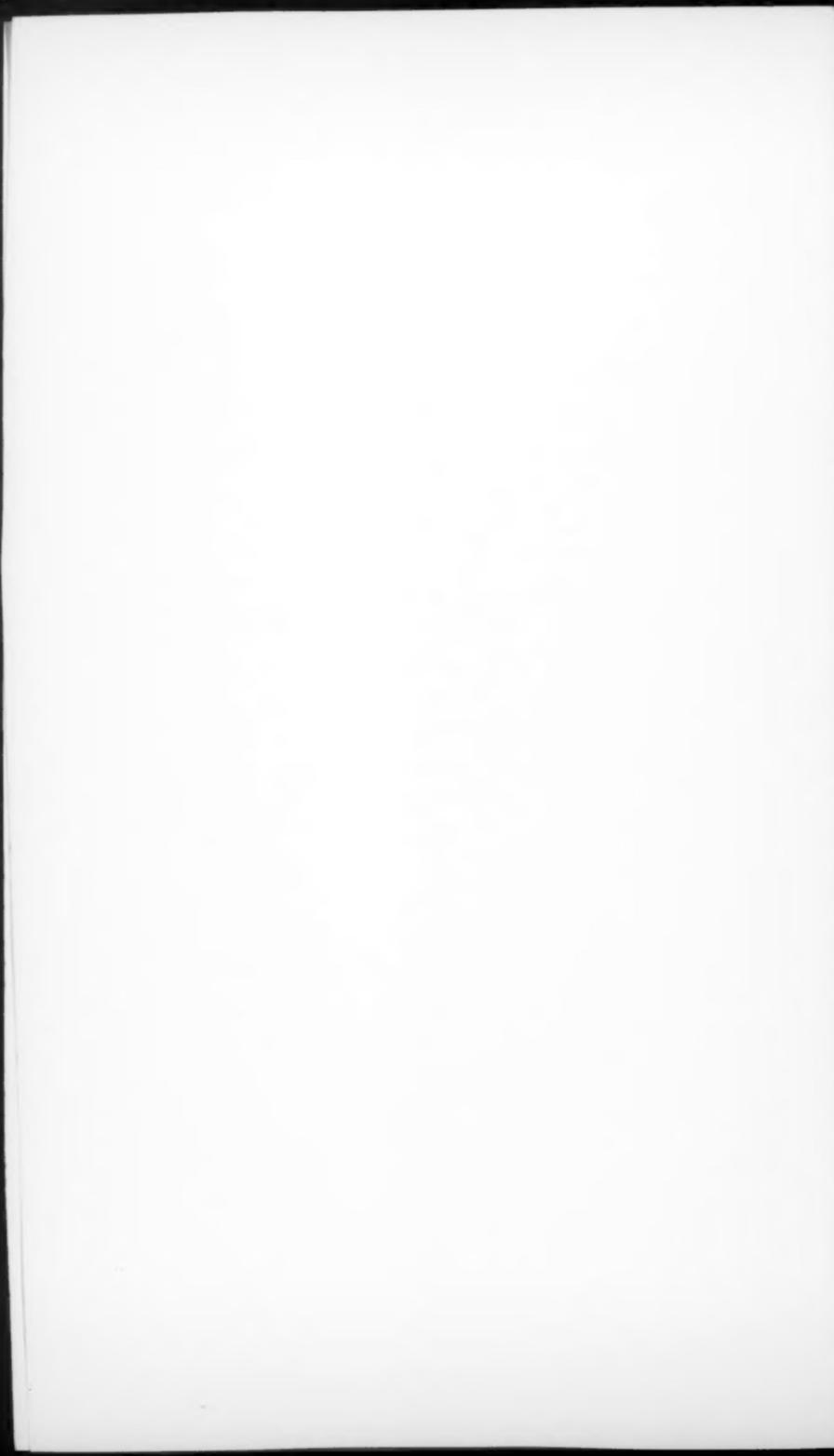
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on admission. The surgical registrar then performed a laparotomy and removed rather more than one and a half litres of blood from the abdomen. There was a section of the intestine which was damaged, and he excised that and joined up the two ends. For several days it seemed as though Mrs. Malcherek was making an uneventful recovery. Indeed, she was clearly confidently expected to survive. However, on 1st April she collapsed and the preliminary diagnosis was that she had suffered a massive pulmonary embolism. She was resuscitated and arrangements were made for her admission to the Western Hospital at Southampton, which was equipped to deal with this type of emergency. She arrived there shortly before midnight. A couple of hours later her condition suddenly deteriorated and her heart stopped. She was taken straight away to the operating theatre and given cardiac massage. The surgeon then opened her chest. He found that her heart was distended and not beating. He made an incision into the pulmonary artery and extracted from the pulmonary artery a large clot of blood some twelve inches long, which had plainly formed in one of the veins of the leg (which, we are told, is a common complication of major abdominal surgery), and had then moved on from the leg to the pulmonary artery with the results already described. When the clot was removed the heart started again spontaneously. It will be appreciated that since the heart was not beating for a period of something like thirty minutes there was a grave danger of anoxic damage to the brain. She was returned to the ward and connected to a ventilator. Throughout the Monday she remained on that machine receiving intensive care, but in the afternoon an electroencephalogram showed that there were indeed symptoms of severe anoxic damage to the brain. The prognosis was poor. The consultant neurologist saw her at 7.00 pm. She was unresponsive to any stimulus save that her pupils did react to light. He suggested a further electroencephalogram because at that stage it was not clear how much brain damage had been suffered. On the morning of Tuesday, Dr. Manners decided to dispense with the ventilator if that could possibly be done. When that was done she was able, first of all, to breathe adequately by herself, but towards midday she suffered a sharp and marked deterioration and the diagnosis was that she had suffered a cerebral vascular accident, possibly a ruptured blood vessel, possibly a clot, causing further brain damage. In any event, by a quarter to two in the afternoon her attempts to breathe were inadequate and she was put back onto the ventilator. There was a continued deterioration and by the following day she was deeply unconscious and seemed to have irreversible brain damage. There was less electrical activity than before when a further electroencephalogram was carried out.

On 5th April the situation had deteriorated still more, and it was quite obvious at 1.15 pm on that day, when Dr. Lawton made an examination, that her brain was irretrievably damaged. He carried out five of the six Royal Medical College confirmatory tests. The one he omitted was the 'gag reflex' test, again for reasons which he explained. The patient's relations were consulted and a decision was made to disconnect the ventilator, which was done at half past four. A supply of oxygen was fed to her lungs in case she should make spontaneous efforts to breathe but she did not, and shortly after





5.00 pm she was certified to be dead.

In these circumstances, as in the earlier case, the judge decided that the question of causation should not be left for the jury's consideration. Consequently, the only issue they had to decide was the one of intent, there being no argument but that Malcherek had in fact inflicted the knife wound or wounds on Mrs. Malcherek. In this case the principal and, in effect, the only ground of appeal, as counsel for Malcherek has told us, is that the judge should have left the issue of causation to the jury. This is not the occasion for any decision as to what constitutes death. Modern techniques have undoubtedly resulted in the blurring of many of the conventional and traditional concepts of death. A person's heart can now be removed altogether without death supervening; machines can keep the blood circulating through the vessels of the body until a new heart can be implanted in the patient, and even though a person is no longer able to breathe spontaneously a ventilating machine can, so to speak, do his breathing for him, as is demonstrated in the two cases before us. There is, it seems, a body of opinion in the medical profession that there is only one true test of death and that is the irreversible death of the brain, which controls the basic functions of the body such as breathing. When that occurs it is said that the body has died, even though by mechanical means the lungs are being caused to operate and some circulation of blood is taking place. We have had placed before us, and have been asked to admit, evidence that in each of these two cases the medical men concerned did not comply with all the suggested criteria for establishing such brain death. Indeed, further evidence has been suggested and placed before us that those criteria or tests are not in themselves stringent enough. However, in each of these two cases there is no doubt that whatever test is applied the victim died; that is to say, applying the traditional test, all body functions, breathing and heartbeat and brain function came to an end, at the latest, soon after the ventilator was disconnected.

The question posed for answer to this court is simply whether the judge in each case was right in withdrawing from the jury the question of causation. Was he right to rule that there was no evidence on which the jury could come to the conclusion that the assailant did not cause the death of the victim?

The way in which the submissions are put by counsel for Malcherek on the one hand and by counsel for Steel on the other is as follows: the doctors, by switching off the ventilators and the life support machines, were the cause of death, or, to put it more accurately, there was evidence which the jury should have been allowed to consider that the doctors, and not the assailant in each case, may have been the cause of death.

In each case it is clear that the initial assault was the cause of the grave head injuries in the one case and of the massive abdominal haemorrhage in the other. In each case the initial assault was the reason for the medical treatment being necessary. In each case the medical treatment given was normal and conventional. At some stage the doctors must decide if and when treatment has become otiose. This decision was reached, in each of the two cases here, in circumstances which

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have already been set out in some detail. It is no part of the task of this court to inquire whether the criteria, the Royal Medical College confirmatory tests, are a satisfactory code of practice. It is no part of the task of this court to decide whether the doctors were, in either of these two cases, justified in omitting one or more of the so called 'confirmatory tests'. The doctors are not on trial: Steel and Malcherek respectively were.

There are two comparatively recent cases which are relevant to the consideration of this problem. The first is *R. v. Jordan* (1). That was a decision of the Court of Criminal Appeal, presided over by Hallett, J. There the appellant stabbed his victim on 4th May, 1956. The victim died in hospital on 12th May. At the trial the pathologist who carried out the autopsy gave evidence that the cause of death was bronchopneumonia following a penetrating abdominal injury. The main burden of the appeal was whether fresh medical evidence, which was not called at the trial, should be admitted and considered by the Court of Criminal Appeal. In due course, in what was described as the exceptional or the exceedingly unusual circumstances of the case, that evidence was admitted. Evidence was given, accordingly, by two pathologists who said that in their opinion death had not been caused by the initial stab wound, which had almost healed at the time of the death, but by the introduction of terramycin after the deceased man had shown himself to be intolerant to that drug and also by the intravenous introduction of huge quantities of liquid, which was an abnormal medical treatment and which, in these circumstances, was quite wrong. The conviction was quashed because the court came to the conclusion, in effect, that the further evidence demonstrated that the death of the victim might not have resulted from normal treatment employed to cope with a felonious injury but that the treatment administered, the terramycin and the intravenous fluid, was an abnormal treatment which was palpably wrong and which, in its turn, caused the death at a time when the original wound was in the process of healing and indeed had practically healed.

The other decision in *R. v. Smith* (2). In that case the appellant had stabbed a fellow soldier with a bayonet. One of the wounds had pierced the victim's lung and had caused bleeding. While being carried to the medical hut or reception centre for treatment, the victim was dropped twice and then, when he reached the treatment centre, he was given treatment which was subsequently shown to have been incorrect. Lord Parker, C.J., who gave the judgment of the court, stressed the fact, if it needed stressing, that *R. v. Jordan* (1) was a very particular case depending on its own exact facts, as indeed Hallett, J., himself had said in that case. In *R. v. Smith* (2) counsel for the appellant argued that if there was any other cause, whether resulting from negligence or not, operating, if something happened which impeded the chance of the deceased recovering then the death did not result from that wound. A very similar submission to that has been made to this court by counsel

(1) (1956) 40 Cr. App. Rep 152

(2) 123 JP 295 [1959] 2 QB 35

in the instant case. The court in *R. v. Smith* (2) was quite unable to accept that contention. Lord Parker, C.J., said:

"It seems to the court that, if at the time of death the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating. Only if it can be said that the original wounding is merely the setting in which another cause operates can it be said that the death does not result from the wound. Putting it in another way, only if the second cause is so overwhelming as to make the original wound merely part of the history can it be said that the death does not flow from the wound."

In the view of this court, if a choice has to be made between the decision in *R. v. Jordan* (1) and that in *R. v. Smith* (2), which we do not believe it does (*R. v. Jordan* (1) being a very exceptional case), then the decision in *R. v. Smith* (2) is to be preferred.

The only other case to which reference has been made, it having been drawn to our attention by counsel for Steel, is *R. v. Blaub* (3). That was a case where the victim of a stabbing incident was a Jehovah's Witness who refused to accept a blood transfusion although she had been told that to refuse would mean death for her, a prophecy which was fulfilled. The passage that has been drawn to our attention in that case is the last paragraph of the judgment of Lawton, L.J.:

"The issue of the cause of death in a trial for either murder or manslaughter is one of fact for the jury to decide. But if, as in this case, there is no conflict of evidence and all the jury has to do is apply the law to the admitted facts, the judge is entitled to tell the jury what the result of that application will be. In this case the judge would have been entitled to have told the jury that the appellant's stab wound was an operative cause of death. The appeal fails."

There is no evidence in the present cases that at the time of conventional death, after the life support machinery was disconnected, the original wound or injury was other than a continuing, operating and indeed substantial cause of the death of the victim, although it need hardly be added that it need not be substantial to render the assailant guilty. There may be occasions, although they will be rare, when the original injury has ceased to operate as a cause at all, but in the ordinary case if the treatment is given bona fide by competent and careful medical practitioners, then evidence will not be admissible to show that the treatment would not have been administered in the same way by other medical practitioners. In other words, the fact that the victim has died, despite or because of medical treatment for the initial

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(1) (1956) 40 Cr. App. Rep 152

(2) 123 J.P. 295; [1959] 2 QB 35

(3) 139 J.P. 841; [1975] 3 All ER 446

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injury given by careful and skilled medical practitioners, will not exonerate the original assailant from responsibility for the death. It follows that so far as the ground of appeal in each of these cases relates to the direction given on causation, that ground fails. It also follows that the evidence which it is sought to adduce now, although we are prepared to assume that it is both credible and was not available properly at the trial (and a reasonable explanation for not calling it at the trial has been given), if received could, in no circumstances, afford any ground for allowing the appeal.

The reason is this. Nothing which any of the two or three medical men whose statements are before us could say would alter the fact that in each case the assailant's actions continued to be an operating cause of the death. Nothing the doctors could say would provide any ground for a jury coming to the conclusion that the assailant in either case might not have caused the death. The furthest to which their proposed evidence goes, as already stated, is to suggest, first, that the criteria or the confirmatory tests were not sufficiently stringent and, secondly, that in the present case they were in certain respects inadequately fulfilled or carried out. It is no part of this court's function in the present circumstances to pronounce on this matter, nor was it a function of either of the juries at these trials. Where a medical practitioner adopting methods which are generally accepted comes bona fide and conscientiously to the conclusion that the patient is for practical purposes dead, and that such vital functions as exist (for example, circulation) are being maintained solely by mechanical means, and therefore discontinues treatment, that does not prevent the person who inflicted the initial injury from being responsible for the victim's death. Putting it another way, the discontinuance of treatment in those circumstances does not break the chain of causation between the initial injury and the death.

Although it is unnecessary to go further than that for the purpose of deciding the present point, we wish to add this thought. Whatever the strict logic of the matter may be, it is perhaps somewhat bizarre to suggest, as counsel have impliedly done, that where a doctor tries his conscientious best to save the life of a patient brought to hospital in extremis, skilfully using sophisticated methods, drugs and machinery to do so, but fails in his attempt and therefore discontinues treatment, he can be said to have caused the death of the patient.

For these reasons we do not deem it either necessary under s.23(2) of the Criminal Appeal Act, 1968, nor desirable or expedient under s.23(1) to receive the proposed evidence of the doctors which, in statement form, has been placed before us. Likewise, there is no ground for saying that the judge in either case was wrong in withdrawing the issue of causation from the jury. It follows that the appeal of Malcherek is dismissed. It now remains to consider the application in the case of Steel in so far as it relates to the matters other than causation.

[The court considered Steel's application for leave to appeal against conviction on the grounds that the jury's verdict was unsafe or unsatisfactory, decided that the verdict was not unsafe or unsatisfactory, and accordingly refused the application.]

Solicitors: *Trevanion & Curtis*, Parkstone; *T I Clough & Co*, Bradford;
Director of Public Prosecutions.

R. v. Steel
R. v. Malcherek
Court of Appeal

Reported by G.F.L. Bridgman, Esq., Barrister

QUEEN'S BENCH DIVISION
(Donaldson, L.J., and Hodgson, J.)
December 8, 1980

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R v. HOLMES. EX PARTE SHERMAN AND ANOTHER

Arrest — Applicants arrested and taken to police station — No charge preferred for four days — Wish of police to make further enquiries — Justification for delay — Judges' Rules, 1964, introduction, para. (d).

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On November 18, 1980, the applicants were arrested by police officers and taken to a police station where they were questioned and made certain admissions in view of which and other evidence the police were in a position to charge them with handling the proceeds of a recent burglary. The police, however, wished to question the applicants regarding a further 100 burglaries committed over a period of three years which involved a complex investigation, and the applicants were not charged with any offence until four days after their arrest and release on bail. They applied for writs of habeas corpus in respect of their detention.

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By para. (d) of the introduction to the Judges Rules, 1964: "When a police officer who is making inquiries of any person about an offence has enough evidence to prefer a charge against that person for the offence he should without delay cause that person to be charged or informed that he may be prosecuted for the offence."

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Held: the law at present was that as soon as there was sufficient evidence to prefer a charge the arrested person must *without delay* be charged or informed that he might be prosecuted for the offence; that was subject to no qualification, and no qualification should be introduced, for example, setting an unduly high standard of "sufficient evidence"; the fact that the police had further enquiries to make which might become more difficult if the arrested person was charged was no justification for disregarding the mandatory requirements of para. (d); the criticism that an officer refrained from charging and kept a man in custody was incomparably more serious than that he charged him on insufficient evidence.

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Arrest — Arrest without warrant — Need to be brought before magistrates' court "as soon as practicable" — Maximum permissible period of detention in absence of special statutory provision — Magistrates' Courts Act, 1952, s.38(4).

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By s.38(4) of the Magistrates' Courts Act, 1952: "Where a person is taken into custody for an offence without a warrant and is retained in custody, he shall be brought before a magistrates' court as soon as practicable".

Held: practicability was obviously a slightly elastic concept which must take account of the availability of police manpower, transport, and magistrates' courts. It will also have to take account of any unavoidable delay in obtaining sufficient evidence on which to charge, but this latter factor had to be assessed in the light of the power of the police to release on bail conditioned by a requirement to return to the police station when further inquiries had been completed and a power to release and re-arrest when the evidence was more nearly sufficient; any such release might involve a risk that the arrested person would abscond, commit further crimes, or interfere with witnesses, but that risk had to be balanced against the vital consideration that no man was to be deprived of his liberty save in accordance with the law: "as soon as practicable" meant within 48 hours at most.

Applications for writs of habeas corpus by Clinton John Sherman and Edward Charles Apps.

C Hookway for the applicants.

A Rawley QC and T Docking for the respondent.

8th December, 1980. The following judgment was read.

DONALDSON, LJ.: At 11.30 am on 18th November, 1980, the applicants were arrested by officers of the Metropolitan Police. They were taken to Kentish Town police station where they were questioned. Their solicitor made inquiries as to where they were and was told. When by the morning of 20th November, they had neither been charged nor brought before a magistrate's court he rightly applied to this court for a writ of habeas corpus. This application was heard that afternoon and was adjourned until 10.30 am on the next day, the applicants' solicitor being told to notify the respondent, Det. Sgt. Holmes of the Metropolitan Police. To our surprise the police were neither present nor represented at the adjourned hearing. Accordingly, we made an immediate order for the issue of a writ of habeas corpus requiring Sgt. Holmes to produce the applicants in court at 2 pm. Half an hour later Sgt. Holmes arrived in court and explained that the applicants' solicitor had left notice of the hearing on the counter of the police station without explaining to anyone what it was. We accept that explanation, but there is a lesson to be learnt. It is the duty of applicants and their solicitors to effect proper service on respondents when ordered so to do.

We then asked Sgt. Holmes for an explanation. He said that the applicants had been arrested and had made certain admissions. On the basis of those admissions and other evidence, he had been in a position on the Tuesday to charge them with handling the proceeds of a single, very recent, burglary. However, both the Metropolitan and the Hertfordshire forces wished to question the applicants in connection with a further 100 burglaries committed over a period of three years in the areas of the two forces. The investigation was necessarily complex and was not made any simpler by the fact that two

police forces were involved, that due to current industrial action cell space was at a premium, and that the applicants and two other people who might be involved were lodged in different police stations. Sgt. Holmes explained that in those circumstances he thought that he was faced with a problem. If he charged the applicants, he or his senior officer would have to consider granting bail, and, as he assessed the situation, bail would in fact have to be granted. Once the applicants left police custody, the investigations would become much more difficult. He told us that in these circumstances, he considered that it was both in the interest of the applicants and of the public that the applicants be retained in custody while, as he put it, 'they assisted the police in their inquiries'. He further explained that he anticipated that all necessary inquiries would be completed by that evening (21st November). The applicants would then be charged and brought before a magistrate on the Saturday morning. By then four days would have elapsed from the time of arrest.

We told Sgt. Holmes that if he would undertake to charge the applicants within an hour and a half, that being the minimum practicable time bearing in mind that he was at the Law Courts and the applicants were in Kentish Town, the writ of habeas corpus would be stayed. Otherwise it would issue forthwith and the applicants would have to be produced in court at 2 pm.

It seemed to both Hodgson, J., and to me that Sgt. Holmes was being completely frank with us, that he quite genuinely could not understand what the fuss was about, and that he was a good police officer doing his duty as he saw it. If this was right, it seemed to us that any criticism should be directed not at Sgt. Holmes but at those in command of the Metropolitan Police whose systems and standing orders had allowed such a situation to arise. We therefore suggested to Sgt. Holmes that he should get in touch with his superior officers and with the legal department of the Metropolitan Police and we further adjourned the matter until 26th November. On that day counsel appeared for the police and we were informed that the applicants had indeed been charged on the Friday and released on bail. This disposed of the matter only in the sense that the applicants had achieved the relief to which they were entitled. But it left much wider and more serious issues for investigation. Due to the shortness of time available counsel for the police had been inadequately instructed and we further adjourned the matter.

At the resumed hearing counsel for the Metropolitan Police made it clear that, while the Commissioner would not have shared Sgt. Holmes's surprise at our anxiety and would have expressed himself somewhat differently, he would on the facts of this case have been fully prepared to justify the actions of the police. Let me explain how this comes about. The Commissioner's view of the law is set out in his written evidence to the Royal Commission on Criminal Procedure (at pp. 42-70, 157-159) and I do not doubt that other chief officers of police share his views. His general orders to the force give effect to this view.

In the instant case there were two matters which caused us particular concern. The first was that Sgt. Holmes appeared to display a complete disregard of the fundamental principle of the common law

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'that when a police officer who is making inquiries of any person about an offence has enough evidence to prefer a charge against that person for the offence, he should without delay cause that person to be charged or informed that he may be prosecuted for the offence.'

The quotation is from para. (d) of the introduction to the 1964 Judges' Rules (see Practice Note [1964] 1 WLR 152).

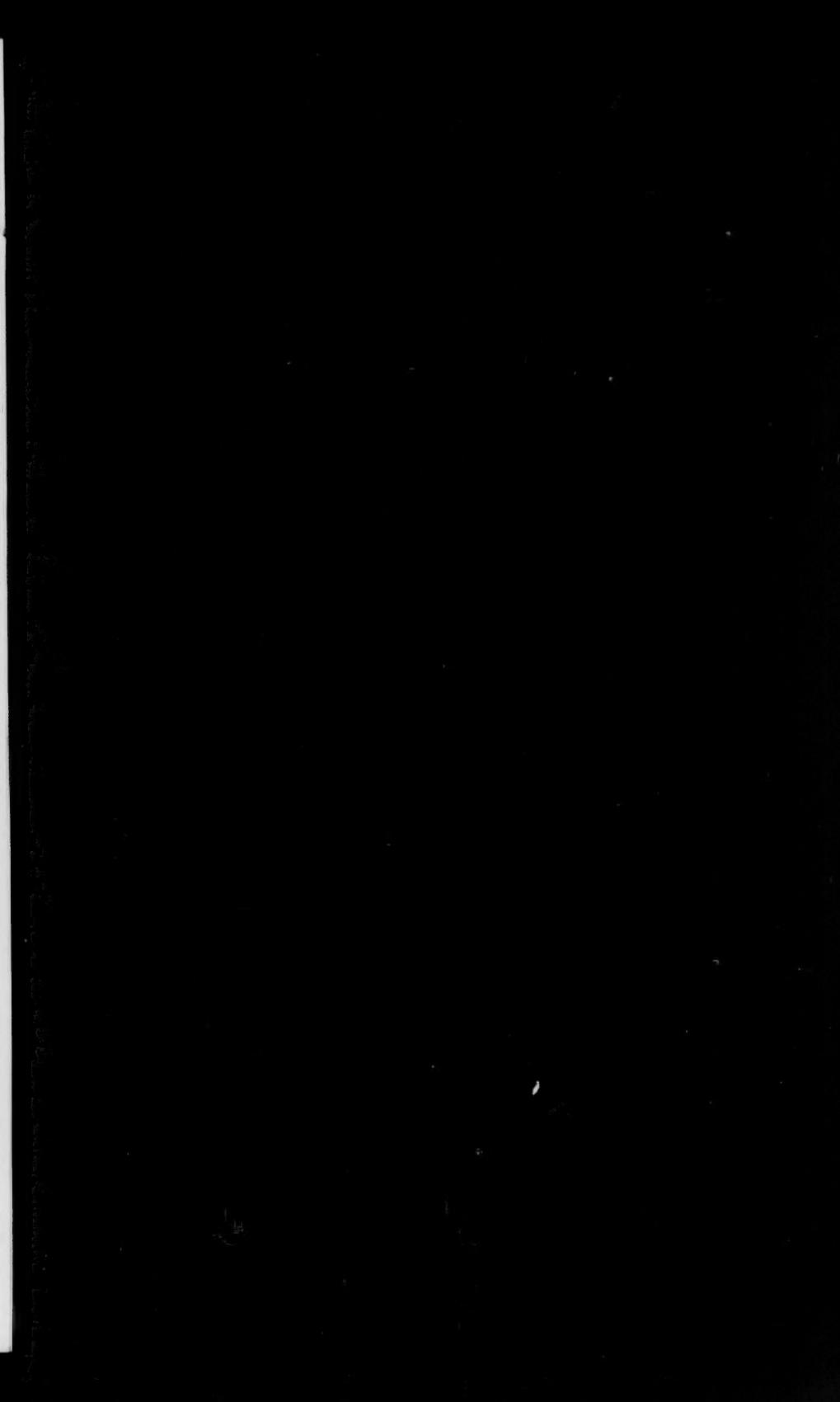
The Commissioner accepts this principle which he refers to as 'principle (d)', and I will use the same terminology. However, he says that he does not agree that Sgt. Holmes had in fact enough evidence to charge the applicants, at any rate during the initial stages of the detention. This is interesting, but the fact remains that Sgt. Holmes was the officer who had to reach a decision, he thought that he had sufficient evidence, and accordingly he should have preferred a charge; furthermore, the fact that he had further inquiries to make, and that these might become more difficult if the applicants were charged, is no justification for disregarding the mandatory requirements of principle (d).

We have not investigated the instant case in detail because to do so in open court might prejudice the subsequent trial of the applicants and, in any event, now that the applicants have been charged and bailed our principal concern is with the system rather than with the instant case.

The Commissioner has criticised principle (d) in the following terms:

'The unsatisfactory nature of principle (d) is that an officer may have sufficient evidence to charge but may wish to defer charging an arrested person to seek advice from his superior officers or to seek legal advice whether or not it is appropriate in all the circumstances of the case to charge. An officer so delaying a charge is in breach of principle (d). Equally he is open to criticism if he does *not* delay and goes ahead and charges although he wanted guidance from his superior officers or legal advice on the exercise of his discretion to prosecute. Additionally an officer may have sufficient evidence to charge a person but wishes to attempt to put that evidence to the test by seeking to obtain corroborative evidence in support. A typical example is that shown in the case [previously] referred to . . . where police received an admission to a murder sufficient to support a charge but the charge was delayed in order to test the veracity of the admission and in particular to recover the murder weapon from the river where it had been thrown. Had the police charged immediately after the confession and the confession had proved as false as the earlier untrue explanations the suspect had put forward as to his movements police would doubtless have been criticised for charging prematurely although certainly they had sufficient evidence to charge; by delaying the charging until they had obtained corroborative evidence it could be argued that police were in breach of principle (d).

'For these reasons I suggest that the principle in rule (d) be amended to recognise the fact that despite the possession by an





officer of "enough evidence" to prefer a charge there may well be perfectly proper reasons why it is not appropriate to charge "without delay".

Suffice it to say that, while there may well be strong grounds for amending the law, the amendment must be achieved in a constitutional manner and not by a process of modification in practice. The law at present is that, as soon as there is enough evidence to prefer a charge, the arrested person must *without delay* be charged or informed that he may be prosecuted for the offence. The principle is subject to no qualification and no qualification should be introduced by, for example, setting an unduly high standard of 'sufficient evidence'. The criticism that an officer refrained from charging and retained a man in custody is incomparably more serious than that he charged a man on insufficient evidence.

The second aspect of the instant case which caused us concern was the delay in bringing the applicant before a magistrates' court. Section 38(4) of the Magistrates' Courts Act, 1952, is unequivocal and imperative in its terms. It reads as follows:

'Where a person is taken into custody for an offence without a warrant and is retained in custody, he shall be brought before a magistrates' court as soon as practicable.'

In both *R. v. Houghton* (1) and in *R. v. Hudson* (2), it was I think accepted that save in a wholly exceptional case the period between arrest and appearance before a magistrates' court should not exceed 48 hours. The same approach seems to have been adopted in the Prevention of Terrorism (Temporary Provisions) Act, 1976. The Act abrogates s.38 of the Magistrates' Courts Act, 1952, where it applies but only permits detention in right of an arrest exceeding 48 hours if the Secretary of State extends this period. This seems to me to point unmistakably to a period of 48 hours as being the maximum permissible period of detention in right of an arrest in the absence of special statutory provision. Counsel for the police drew our attention to s.29(5) of the Children and Young Persons Act, 1969, as amended by the Bail Act, 1976, which requires a young person to be brought before a magistrates' court within 72 hours. He submitted that this pointed to a longer period than 48 hours being acceptable under s.38 of the 1952 Act. I do not think that this inference can be drawn. Section 29 is a self-contained code applying to children and young persons which is designed primarily to achieve their immediate release from arrest or alternatively their transfer to the care of a local authority. It is primarily concerned with their welfare. It is only in a well-defined and wholly exceptional case that a delay of 72 hours in bringing a detained child or young person before a magistrates' court is specially authorised.

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(1) (1978) 68 Cr. App. R. 197

(2) (1980) *The Times*, Oct. 29.

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It was against this background that we were told that in a specimen period of three months, for which statistics were specially prepared for the Royal Commission, 212 persons or 0.43% of those arrested in the Metropolitan Police District, were detained for more than 72 hours before being brought before a magistrates' court. The percentage may be tiny, but we are concerned with people not percentages. No figures are available for the number of persons who were so detained for more than 48 hours, but clearly it must have been higher.

What is the reason? I think that it is largely the time lag between arresting on suspicion and the stage at which the police consider that they have sufficient evidence to charge. Curiously enough, s.38 of the 1952 Act makes no mention of the preferment of a charge as a precondition of bringing the arrested person before a magistrates' court. However, the Commissioner takes the view that this is the position and I know that many lawyers would agree with him. He has recommended that this precondition be removed by giving magistrates power to consider bail before a charge is made and requiring the police to bring an arrested person before a magistrate within 72 hours of arrest.

There is much to be said for this recommendation, but both we and the police have to live not only with but by the law as it is. The arrested person has to be bailed or brought before a magistrates' court 'as soon as practicable'. Practicability is obviously a slightly elastic concept which must take account of the availability of police manpower, transport and magistrates' courts. It will also have to take account of any unavoidable delay in obtaining sufficient evidence to charge, but this latter factor has to be assessed in the light of the power of the police to release on bail conditioned by a requirement to return to the police station when further inquiries have been completed and a power to release and re-arrest when the evidence is more nearly sufficient. Any such release may involve a risk that the arrested person will abscond, commit further crimes, or interfere with witnesses, but this risk has to be balanced against the vital consideration that no man is to be deprived of his liberty save in accordance with the law. 'As soon as practicable' still means 'within about 48 hours at most'.

The Commissioner in his evidence to the Royal Commission says that:

'A suspect in custody aggrieved about the length of time taken before a charge is preferred is not without remedy because he can apply to the Divisional Court for a writ of habeas corpus. This is by no means a legal remedy that has fallen into disuse but a real and available remedy. In 1977 there were 55 applications to the Divisional Court for writs of habeas corpus.'

This is true, but habeas corpus is a remedy for an abuse of power and it should rarely be necessary to invoke it. Furthermore, if, as the Commissioner seems to suggest, an application for such a writ is to be regarded as a routine method whereby any arrested person aggrieved by his detention can find out whether his grievance is justified, this court is going to be extremely busy and a great deal of police time is going to be spent in justifying detentions. This is not an at-

tractive prospect. However, it is right that all should know that the writ of habeas corpus has not fallen into disuse, but is, as the Commissioner says, a real and available remedy. They should also know that, if the arrested person is unable to apply for the issue of the writ, others may do so on his behalf. Furthermore, such applications are given absolute priority in the fixing of the business of the court. I would only add the caution that the costs to the applicant of a frivolous application may be considerable, as will be the cost to the police if the application is found to be justified.

The police are undoubtedly carrying out their duties under very considerable difficulties which are both logistic and legal. We are told that the report of the Royal Commission will be published in the fairly near future. Once that report has been published and the recommendations of the commission considered, I hope that Parliament will feel able to treat the clarification and improvement of the law in this field as a matter of the utmost urgency.

In this case the applicants were fully justified in making this application which has resulted in their being charged earlier than would otherwise have been the case and also expedited their release on bail. Their costs will be paid by the police.

HODGSON J. I agree.

Hodgson, J

Solicitors: *Howard Gross & Co; R E T Birch.*

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Reported by G.F.L. Bridgman, Esq., Barrister.

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QUEEN'S BENCH DIVISION
(Lord Lane, C.J., and Webster, J.)
November 12, 1980

R. v. CANTERBURY AND ST AUGUSTINE'S JUSTICES. Ex parte
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R. v. RAMSGATE JUSTICES. Ex parte WARREN AND OTHERS

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Magistrates — Trial — Charges triable "either way" — No evidence offered by prosecution — Substitution of charges triable summarily — Validity.

The applicant in the first case was charged before justices under the Criminal Damage Act, 1971, with criminal damage to the value of £414. As the sum exceeded £200, by s.23 of the Criminal Law Act, 1977, the charge was triable either by the justices or by the Crown Court. The applicant elected for trial in the Crown Court, and the case was adjourned to enable the prosecution to serve witness statements. When the applicant next appeared before the justices the prosecution preferred an amended charge against him in which the value of the damaged property was alleged to be £154. The prosecution offered no evidence on the original charge and the applicant was discharged, and, as the value involved in the amended charge did not exceed £200, the justices adjourned the case for a summary trial under s.23(2) of the Act of 1977.

In the second case four applicants were charged with offences involving breaches of the peace and they chose trial in the Crown Court in respect of those offences which were triable "either way". When later the applicants appeared before the justices the prosecution offered no evidence on those of the original offences which had been triable "either way", the justices discharged the applicants in respect of those offences, and adjourned the hearing of the offences which were triable summarily.

In both cases the applicants submitted that the justices ought not to have allowed the prosecution to offer no evidence on the original charges and there had been an abuse of the process of the court. They applied for judicial review of the orders made by the justices and orders prohibiting the justices from proceeding to hear the amended charges.

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Held: it was not open to the justices to question the prosecution's decision to offer no evidence; when offences were not grave ones and the powers of justices were appropriate there was no reason why a prosecuting authority should not change an offence which was not the gravest possible charge on the facts; there might be many reasons for choosing a lesser charge, among others speed of trial, sufficiency of proof, and trial summarily rather than on indictment; it was necessarily a matter of discretion and careful choice; if the offence was nothing more than could properly be dealt with summarily it was proper so to charge it despite the fact that the defendant might thereby lose his right to trial by jury; it was conceded that in both cases the prosecution had acted in accordance with the relevant statutory provisions, there was nothing in the results which was unfair, and it could not be said that there was any abuse of the process of the court.

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Magistrates — Abuse of powers of court — Action by justices — Only when blatant injustice disclosed.

Per Curiam: the power of justices to act so as to prevent any abuse of the processes of their court must be exercised very sparingly and only in circumstances which disclosed blatant injustice.

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Applications for judicial review.

- A. Speaight for the applicants in the first case.
- B. Prior for the applicants in the second case.
- D. Pitman for the respondents in both cases.

LORD LANE, C.J. These are two applications for judicial review directed respectively to the Canterbury and St Augustine's justices and to the Ramsgate justices. They raise very similar points and, at the request of the parties, we heard them together. The points, if we may say so, have been argued with great skill, economy of words and charm by all the advocates, and we are very grateful for the assistance which has been given to us in this matter.

I take the Klisiak case first. That arose out of an incident on 21st July 1978 in a public house at Westbere in the county of Kent. The result of that incident was a considerable amount of damage to the public house and its contents. On 19th October, 1978, the applicant was charged under the Criminal Damage Act, 1971, with criminal damage to eight items of a total value of £414.05. The items (and it is important to list them for reasons which will be apparent in a moment) were these: 12 glasses, 12 tumblers, 5 ashtrays, 5 stools, a table, a door, a countertop and a wall. That was the original charge, and the applicant will, if the question ever arises, plead not guilty to it at the trial. On 22nd November, 1978, he appeared before the justices at Canterbury on a charge under s.1 of the 1971 Act. Under the provisions of the Criminal Law Act, 1977, that charge was triable either way, that is to say, either before the justices or at the Crown Court. By s.23 of the 1977 Act, the following provisions are made:

'(1) If the offence charged by the information is one of those mentioned in the first column of sched. 4 to this Act (in this section referred to as "scheduled offences") then, subject to subsection (7) below, the court shall, before proceeding in accordance with s.20 above, consider whether, having regard to any representations made by the prosecutor or the accused, the value involved (as defined in subsection (10) below) appears to the court to exceed the relevant sum. For the purposes of this section the relevant sum is £200.

'(2) If, where subsection (1) above applies, it appears to the court clear that, for the offence charged, the value involved does not exceed the relevant sum, the court shall proceed as if the offence were triable only summarily, and ss.20 to 22 above shall not apply.

'(3) If, where subsection (1) above applies, it appears to the court clear that, for the offence charged, the value involved exceeds the relevant sum, the court shall thereupon proceed in accordance with s.20 above in the ordinary way without further regard to the provisions of this section . . .'

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Section 20 deals with the mode of trial and, in short, what those provisions mean, so far as is material here, is that under £200 damage is tried summarily and over £200 damage means that the accused has the right of election to go to the Crown Court for trial by jury, if he so wishes.

Section 23 (4) reads as follows:

'If, where subsection (1) above applies, it appears to the court for any reason not clear whether, for the offence charged, the value involved does or does not exceed the relevant sum, the provisions of

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subsections (5) and (6) below shall apply.'

Again, in short, that means that where the value is not clear, the court must give the defendant the right to elect the mode of trial.

The applicant appeared before the justices on 22nd November, 1978, and the court followed the procedure which is laid down in those sections. It was apparent that the value was over £200 because the charge sheet alleged it at £414.05. The court accordingly offered the applicant the opportunity to elect for trial in the Crown Court if he so wished. The court then adjourned the case to enable the prosecution to serve witness statements in the usual way, because the applicant did elect for trial by jury.

No statements were, in fact, served, but on 8th December a letter was sent from the superintendent of the Kent County Constabulary to the applicant's solicitors which reads:

'Dear Sir,

'Mark Peter Klisiak:

'I would refer to the case against the above-named and would inform you that prior to the court hearing on 20th December, 1978, it is intended to prefer an amended charge upon your client. A copy of this charge is attached and I would draw your attention to the value which, as you of course will realise, precludes this case from a Crown Court hearing.'

The charge reads as follows. It is headed with the name of the applicant and records his address, his sex, his date of birth and his nationality. It is headed: 'Amended — Charge(s)': Then it says:

'You are charged with the offence(s) shown below. You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence.'

Then there is typed:

'On the 21st July, 1978, at Westbere in the county of Kent, without lawful excuse [the applicant] damaged five glass ashtrays, five stools, one table, one countertop and a wall, together valued at £154.89, belonging to John Hedigan, intending to damage such property or being reckless as to whether such property would be damaged. (Contrary to section 1 Criminal Damage Act, 1971).'

It will be observed that that differed from the original charge because it omits the stem glasses, the damage to the door, and the damage to the pint tankards. It adjusts the value accordingly from £414 to £154.89.

On 20th December the applicant appeared before the Canterbury justices. The new charge was read over to him before the hearing and the matter was called on before the justices. The story is then taken up in para 4 of the affidavit of the chairman to the justices, which reads as follows:

'At the hearing on 20th December, 1978, before us, the prosecution offered no evidence upon the first charge on the basis that there was no evidence to support a charge alleging damage to all the items in that charge, and in particular there was no evidence to support the allegation that the defendant caused damage to the twelve stem glasses, twelve pint glass tankards and one front door. The defendant, through his counsel, invited the court to reject the application. We accepted the submission by the prosecution that the police had insufficient evidence to proceed on the first charge, discharged the defendant in accordance with the provisions of s.7 of the Magistrates' Courts Act, 1952, upon the charge, and refused an application by the defendant for costs both out of central funds and against the police.'

No details of the evidence were given and the court accepted, as is apparent from that paragraph, the prosecution's submissions without further inquiry.

Counsel for the applicant in this case submitted to us that the prosecution could have operated by means of either of two methods apart from the one they in fact adopted. First of all, they could have amended the original charge; secondly, they could have waited until the evidence in the committal proceedings had been given and then made submissions as to the appropriate charge because, he says, the charge does not have to be written down at the commencement of the proceedings. He submitted that if a prosecutor at a committal is concerned with the weakness of his case, he can wait until the end of the committal proceedings and put the matter right at that stage. He points out that the significance of the course which was actually adopted by the prosecution in this case is that the applicant did not have the right to elect trial by jury. On the other hand, he says that if the prosecution had taken either of the two alternative courses then the right of election would still have been open to the applicant. The prosecution, on the other hand, applied to the magistrates to treat the new charge as entirely separate.

What happened afterwards is again set out conveniently in the very helpful affidavit of the chairman of the magistrates, Mr Mount. The affidavit reads:

'5. We then proceeded to deal with the second charge and heard representations from both the prosecution and the defence upon the value of the damage alleged in accordance with the provisions of s.23 of the Criminal Law Act, 1977. We were invited on behalf of the defendant to hear evidence as to the value involved, but we took the view that the statutory provisions permitted us merely to hear representations from either side and did not permit us to hear evidence upon this point.

'6. We heard details from the prosecution of the estimate for the replacement or repair of all the damaged items set out in the first charge, which amounted to £414.05. We were invited by the prosecution to deduct the estimated cost of the replacement of

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the twelve stem glasses and twelve pint glass tankards, which we were advised by the prosecution was £8.16, and the cost of the replacement of the front door which was £252, these items of damage, no longer being alleged against the defendant, to reach the figure put forward by the prosecution in respect of the second charge of £154.89.

'7. The defendant through counsel submitted that there had been a major disturbance and a very large amount of damage had been done; that it was artificial to allege only parts of the damage and that the damage was not clearly under £200. He further submitted that there had been one big incident, that value added tax had not been included in the estimate, that there was the possibility of the replacement of items by further items which were not identical with those damaged and that the defendant understood that the work done to the front door had been £215, £36 less than put forward.

'8. We indicated to the parties before retiring to consider the matter that if we were minded to rule against the defendant, before so doing we would ask the prosecution to make inquiries as to the actual cost of replacement and repairs as opposed to the estimates, as we were advised that the necessary replacements and repairs had already been undertaken.

'9. Having careful regard to the representations made, we were of opinion that it was clear that for the offence alleged, the value of damage involved did not exceed £200.

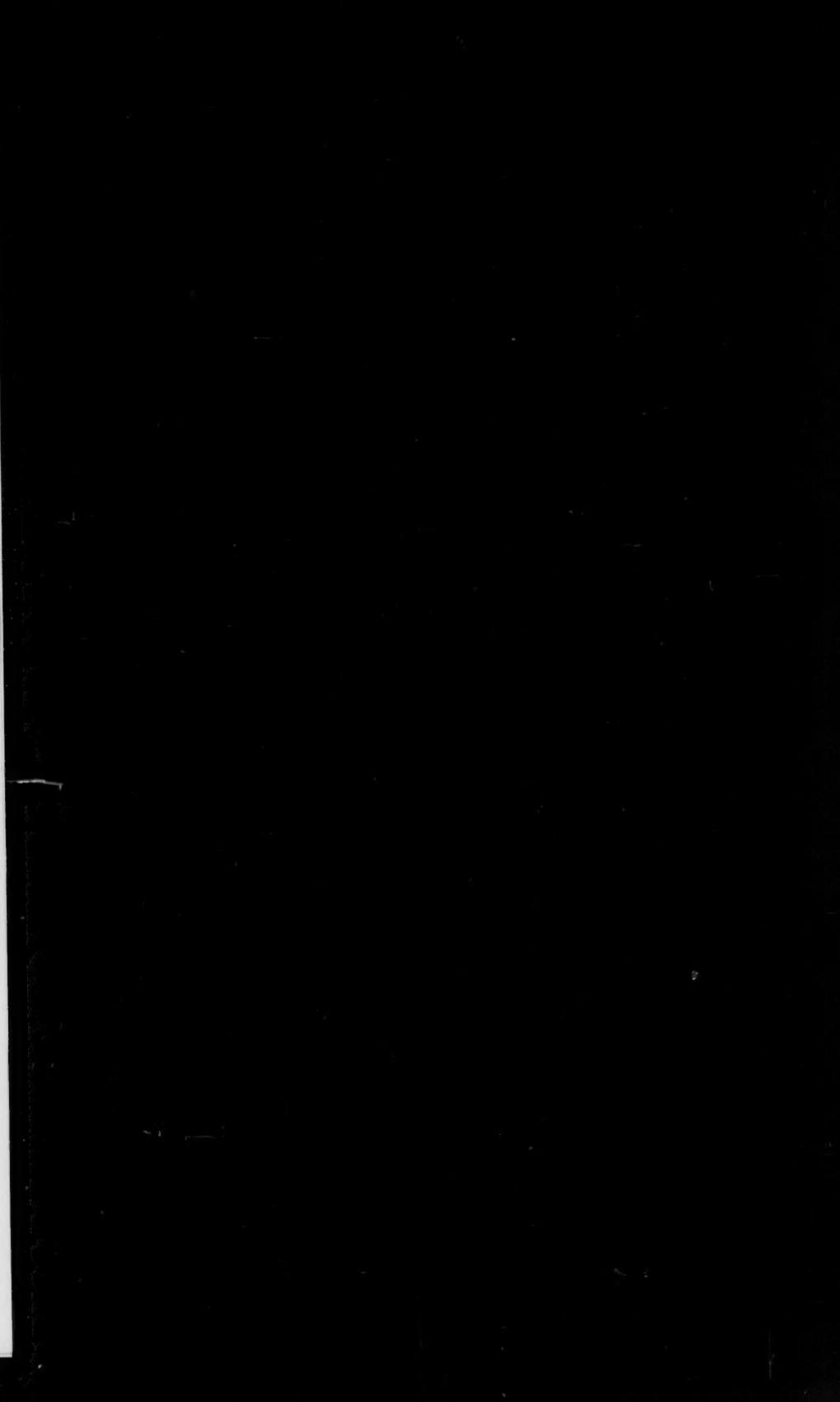
'10. We advised the parties of our opinion and requested the prosecution to inquire what the actual cost of the replacements and repairs had been. After a short adjournment, the prosecution advised us that the actual cost, including value added tax, of replacement of the five glass ashtrays, five stools and one table had been £155.36, and that the cost, including value added tax, of the repair of the countertop and wall had been £29.37, making a total of £146.73.

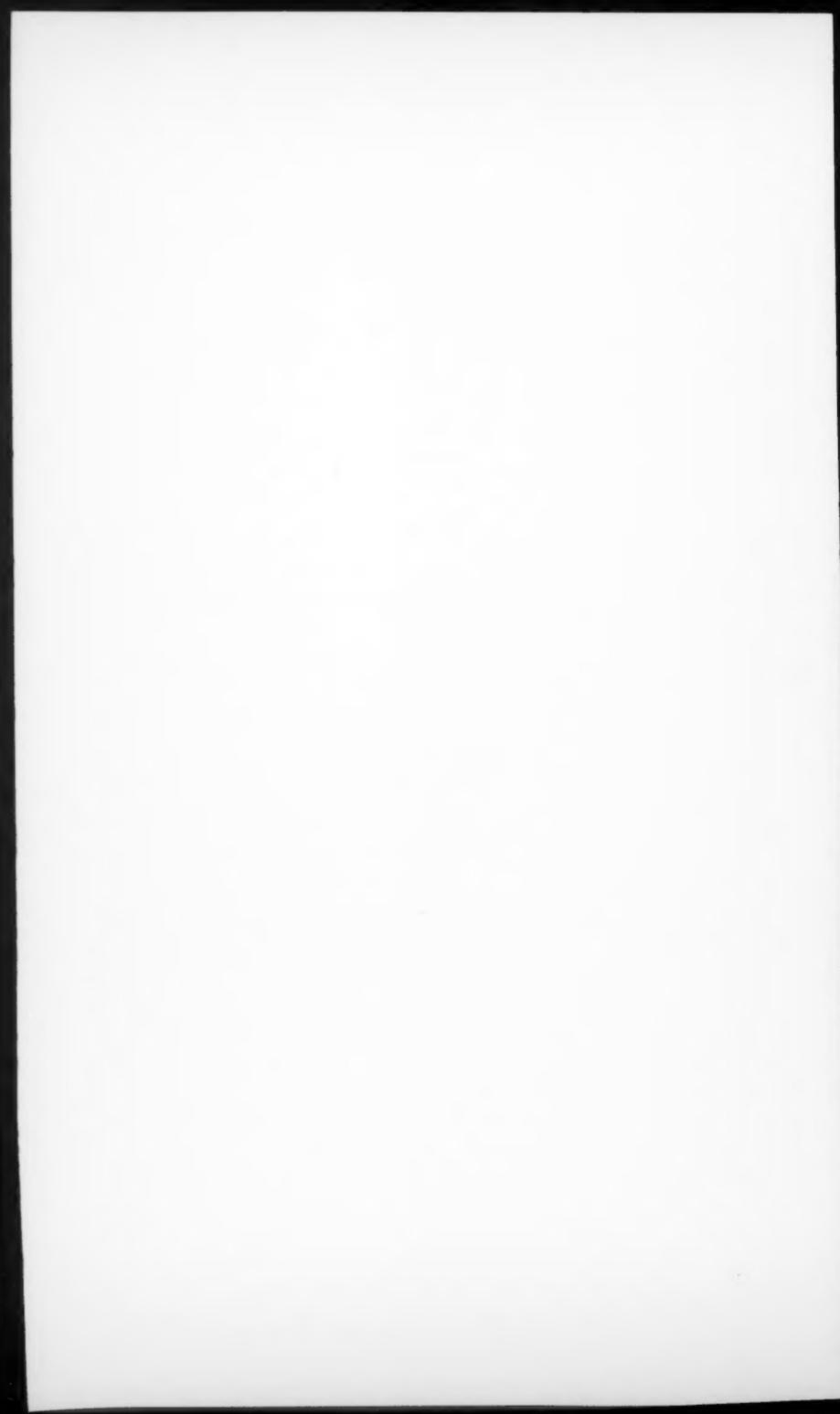
'11. We ruled that it appeared clear to the court that for the offence charged the value involved did not exceed £200, and we adjourned the case for a summary trial.'

On 9th May, 1979, there was a further hearing before the magistrates' court at which counsel for the applicants invited the magistrates to consider whether the damage alleged under the new charges fell within the exception provided by s.23(7) of the Criminal Law Act, 1977, which provides as follows:

'Subsection (1) above shall not apply where the offence charged – (a) is one of two or more offences with which the accused is charged on the same occasion and which appear to the court to constitute or form part of a series of two or more offences of the same or a similar character . . .'

I turn now to the facts of the Ramsgate case. They are as follows: the four applicants are Paul Richard Warren, David Michael Pain, John Terence Goulding and Karl William Elliot. On 10th May, 1980, there was a disturbance on the sea front at Ramsgate. The two applicants, and two other youths as well, were arrested as a result of





those disturbances. On 11th May the four applicants were charged as follows: Warren was charged with a breach of the peace under s.5 of the Public Order Act, 1936; with assault on a police constable in the execution of his duty under s.52 of the Police Act, 1964, and assault occasioning actual bodily harm under s.47 of the Offences against the Person Act, 1861. Pain was charged with a breach of the peace under s.5 of the Public Order Act, 1936, assault with intent to prevent his lawful detainer under s.38 of the Offences against the Person Act, 1861, and another charge under the same section, and, finally, assault occasioning actual bodily harm, apparently under s.47 of the 1861 Act.

Goulding was charged with a breach of the peace under s.5 of the Public Order Act, 1936, and with assault with intent to prevent his lawful detainer under s.38 of the Offences against the Person Act, 1861. Elliot was charged with breach of the peace under s.5 of the Public Order Act, 1936, and an assault with intent to prevent his lawful detainer under the 1862 Act. The other two youths, who I have already mentioned, were charged with offences triable summarily only.

On 2nd June, 1980, Pain, Goulding and Elliot appeared before the justices, when the prosecution applied for an adjournment and made the suggestion that the applicants might be charged with more serious offences, in particular, possibly with affray. All three had been on bail. A similar suggestion had been made in respect of Warren, who was remanded in custody, he having been on bail for another offence at the time of this incident (in which he is alleged to have been involved) took place.

On 30th June the applicants again appeared before the justices, when each elected trial in the Crown Court in respect of those offences with which they had been charged and which were triable either way, and the committal proceedings were then apparently adjourned. Meanwhile, it is clear that the police resolved that they would not proceed with the offences which were triable either way, but would substitute similar charges which were triable only summarily. As a result of the determination, on 7th July, 1980, and before the applicants appeared in the court, they were charged in the following manner. Warren was charged with an assault on a constable under s.51 of the Police Act, 1964, Pain was charged with obstructing a police constable in the execution of his duty (there were two charges to that effect under the same section) and also with an assault on a police constable under sub-s (1) of the same section, Goulding was charged with obstructing a police constable in the execution of his duty under s.51(3) of the 1954 Act, and Elliot was charged with a similar offence under the same Act.

The way in which the matter was put was this (and I say in parenthesis that plainly very similar considerations arise in each of these two cases, although there are differences as will appear in a moment). The first submission made by counsel on behalf of the applicant Klisiak was that the justices ought not to have acceded to the prosecution offering no evidence so far as the material allegations in the original charges were concerned. Secondly, he submits that the justices ought to have treated the new charges as an amendment rather than as distinctly different charges. Thirdly, he submits that evidence ought to have been admitted as to the value of the damage done in the Klisiak case. Fourthly,

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he submits that, if evidence was not admissible so far as the damage was concerned, the court ought to have regarded the damage either as being plainly over £200 or as it not being clearly established as to whether it was over £200 or not. Finally, the submission was to the provisions of s.23(7) of the Criminal Law Act, 1977, should have been held to apply to this case.

The first submission was that when a prosecuting authority offers no evidence, the court's consent (and this, the submission goes, comprises magistrates as well as any other court) is required to that course being followed.

We will refer to the decision in *R. v. Broad* (1). All I need read from that case is the headnote. It says:

'Where an accused person has been charged on indictment with an offence and counsel for the prosecution invites the trial judge to approve that the prosecution do not proceed, the judge is not a rubber stamp to approve a decision of counsel without further consideration; but may, having read the papers and formed the conclusion that there was very substantial evidence in the accused's case which a jury ought to consider, order the trial to proceed. Further, in the absence of an application that another judge should try the case, the judge is abundantly entitled to try the case himself.'

It seems to me that those considerations do not apply to committal proceedings and to justices in committal proceedings. They only apply where there has already been a committal as, in my view, it is not open to justices to question the prosecution's decision to offer no evidence. They have insufficient material before them on which to come to a conclusion; they have not, like the judge at the Crown Court, depositions or statements on which to base their conclusion. In any event, a refusal to commit by the justices in these circumstances does not act as an acquittal or a bar to further proceedings. If any authority is required for that, it is to be found in Lord Widgery, CJ's judgment in *R. v. Manchester City Stipendiary Magistrates, ex parte Snelson* (2).

Next it is submitted that the justices always have a discretion to prevent an abuse of the process of their court, and this, it is alleged, is what happened on both these occasions.

We were referred to a number of authorities on the powers of courts to prevent an abuse of the process before them. Principally the cases were *Connelly v. Director of Public Prosecutions* (3), *Mills v. Cooper* (4) and *Director of Public Prosecutions v. Humphrys* (5).

(1) (1979) 68 Cr. App R 281

(2) 142 JP 274; [1977] 1 WLR 911

(3) 128 JP 418; [1964] AC 1254

(4) 131 JP 349; [1967] 2 QB 459

(5) 140 JP 386; [1977] AC 1

I am prepared to assume that there does exist in the justices an inherent power to act so as to prevent any flagrant abuse of the processes of their court, limited necessarily by any relevant statutory obligation. This power, if it exists, would have to be exercised by the justices very sparingly and only in the most obvious circumstances which disclose blatant injustice. There must be, somewhere, some limit as to what can be done before the court, and in that respect we were referred to *R. v. Bennett* (6), and to *R. v. Bodmin Justices, ex parte McEwen* (7). The passage in the judgment of Lord Goddard, CJ in *McEwen's* case is material.

'The accused, a soldier, was alleged, during a barrack-room quarrel, to have stabbed another soldier in the back with a bayonet, the injury being of so serious a nature that the doctors were of opinion that the injured man could not survive, and steps were taken to get his evidence by deposition. He, however, recovered, and at the trial before a court of summary jurisdiction, where the accused was charged under the Offences Against the Person Act, 1961, with "wounding with intent to do grievous bodily harm", the justices, at the request of both the prosecution and the defence, allowed the charge to be reduced to one of "unlawful wounding", and proceeded to deal with the case summarily. The accused pleaded guilty to the misdemeanour and the justices retired to their room to consider their sentence.'

There was then a further matter which resulted in the conviction being quashed, and Lord Goddard, L.J., said this:

'Here is a case in which a man's life has been seriously imperilled and if he had died the applicant would have been charged with murder. It was never intended that justices should deal under that section with cases of this sort, where a man, whether under the influence of drink or not, takes a bayonet and stabs another in the back with the consequences which are disclosed here, and for justices to deal with it by treating it as nothing much more than common assault is a most extraordinary state of affairs. Justices should remember that they have to deal with matters of this sort judicially, and, although they must take into account what the prosecution and the defence say with regard to whether or not it is a proper case for the charge to be reduced, they are not bound, because the prosecution want to get the matter dealt with there and then without the necessity of going to the assizes (where this case undoubtedly should have been sent) to assent to dealing with it summarily.'

It seems to be, however, that in the present case it cannot be said that there was any abuse of the process of the court. If this charge

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(7) 111 JP 47; [1947] KB 321

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had originally been laid in the sum of under £200, in Klisiak's case, as it might well have been, and in the Ramsgate case, if the charges had originally been laid under s.51 of the Police Act, 1964, there could have been no possible complaint that anyone had been deprived of his right to elect trial. It seems to me that to achieve this same result by the procedural course which, in fact, was adopted, cannot be said to have been oppressive or unjust or an abuse of the processes of the court. Indeed, what the prosecution have done is to lower the nature of the case against the defendant and the possible consequential penalties. We have a Gilbertian result here of applicants complaining that they are now charged with lesser offences than those which they originally had to face. The prosecution, it is conceded, acted in accordance with the statutory provisions and, in my judgment, there was nothing in the result which was unfair.

In Klisiak's case, the new charge was headed 'Amended Charge(s)', and one of the planks of the argument of counsel for the applicant in that case was that the justices should have treated it as such, in which case the possibility of election would still have been open to his client. However, it seems to me that the justices were not bound by the heading which the prosecuting authority chose to put on the document. There is no doubt but that he was charged in new terms and, consequently, in my judgment, there is nothing in that point.

One comes next to the argument that the justices should have allowed evidence to be called on the question of the value of the property damaged in the Klisiak case. For the purposes of clarity, I repeat the provisions of s.23(1) of the Criminal Law Act, 1977, in so far as they are material. They are as follows:

'the court shall, before proceeding in accordance with s.20 above, consider whether, having regard to any representation made by the prosecutor or the accused, the value involved (as defined in subs.(10) below) appears to the court to exceed the relevant sum.'

As I say, the argument is that the justices should have heard evidence. It is not altogether clear whether they decided they had no right to hear evidence, as seems to be the case in their own affidavit, or whether, as seems to appear from the applicant's affidavit, they elected not to hear evidence. It is a distinction which is of no importance on the facts of this case, as will appear. The word 'representations' implies something less than evidence. It comprises submissions coupled with assertions of fact and sometimes production of documents. The nearest analogy is, perhaps, the speech in mitigation after a finding or plea of guilty in a criminal trial. The justices did hear representations in the present case, as has already been made apparent from the passage in the affidavit by the chairman of the justices, Mr Mount, which I have read. They heard eventually an assertion of the facts as to the value of the damage done, again as appears from the portion of the affidavit which I have read. They could, in my judgment, if they had in their discretion wished to do so, have heard evidence, but here there was no call for it and they came to the proper, if not the only, conclusion on the representations which they had before them. Consequently, that point

must fail.

Finally, counsel for the applicant Klisiak argues that the justices were wrong in not coming to a conclusion in his favour on the terms of s.23(7) of the 1977 Act. Again, at the risk of prolixity, I will repeat the terms of the subsection:

'Subsection (1) above shall not apply were the offence charged – (a) is one of two or more offences with which the accused is charged on the same occasion and which appear to the court to constitute or form part of a series of two or more offences of the same or a similar character . . .'

The object of that subsection is plainly to prevent the prosecution from alleging, in the case of criminal damage, a series of offences, each of them of damaging property less than £200 and thereby avoiding the chance of the accused to elect a trial by jury.

We were referred to an unreported decision of the Court of Appeal, by which, of course, this Divisional Court is bound, in *R. v. Camberwell Green Magistrates, ex parte Prescott* (8). It contains in the judgment of Ormrod, L.J., with which Browne, L.J., agreed, a judgment as to the meaning of the word 'series' in this particular context:

'When one turns to the nature of the offences charged in this case, one is an offence of obstructing a police officer in the course of his duty, and the other is the offence of criminal damage to the officer's trousers. It seems to be plain beyond any question that the two offences are not of the same or similar character, nor can I see on the facts of this case how these two offences could possibly be described as a "series". There is no series. Miss Bedford gave us a definition of the word "series" from the Oxford Dictionary as "a number of things of one kind or following one another in temporal succession". Here we have two offences of an entirely different kind which occurred simultaneously and so do not follow one another in temporal succession. It seems to me, therefore, perfectly plain that s.23(7) [of the Criminal Law Act, 1977] does not apply in this case and consequently that the magistrate was correct in the conclusion to which he came.'

Counsel for the applicant Klisiak concedes that that judgment is in direct conflict with the submissions he makes to this court, and with that we would agree, but on the other hand it seems to us, independently of that judgment, that it cannot be said that the earlier charge and the later charge in this case can possibly fall within the terms of s.23(7), which I have just read. These two charges cover much of the very same items of damage, each of them. They cannot, by any stretch of the imagination, in my judgment, be regarded as a series or part of a series.

That leaves the one additional point made by counsel on behalf of the four Ramsgate applicants, he having adopted the arguments of

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counsel for the applicant in the other case in so far as those were arguments which fell to be considered in his own set of facts. The point made by counsel was this, the evidence and affidavits in the Ramsgate case show that the decision to offer no evidence, so far as the first offences were concerned, was not based on an assessment of the serious conduct of the accused but was to prevent the case being tried on indictment. For that purpose he referred us to the affidavit filed by Chief Superintendent Alan Harry Stuart, of the Margate police station. Paragraph 5 of the affidavit reads as follows:

'The factors that influenced me in deciding not to charge the offences of affray and to seek to have the said four defendants summarily dealt with were (i) the view in *R. v. Crimlis* (9) as to when affray should be charged, there being individual charges against each of those alleged offenders concerned in the indictment; (ii) that the said Russell Edward Pittock and David Alexander Murray were charged only with summary offences and it was desirable that all defendants be dealt with at the same court.'

I interpolate there to mention that Pittock and Murray were the other two youths I have mentioned, apart from the four applicants whose names appear at the head of these proceedings.

'(iii) the state of cases listed for hearing in Crown Courts in Kent and the exceptional time certain cases take before being heard; (iv) the abnormal number of cases in the Isle of Thanet where defendants in the petty sessional divisions of Margate and Ramsgate elect for trial at the Crown Court and plead to the charges on arraignment notwithstanding having been supplied with copies of statements prior to the committal proceedings; (v) the often-expressed view of High Court judges that whenever appropriate, criminal cases should be dealt with summarily and not at the Crown Court, and I was satisfied that the magistrates could deal with this matter adequately on a summary basis; (vi) public policy in as much as in a seaside town such as Ramsgate, it is appropriate to have summertime public disturbances on the seafront and harbour areas dealt with as speedily as possible to deter any possible recurrences.'

It seems to me that having read that affidavit, the attitude and course adopted by the prosecuting authorities in this case fell within the principles which I have already endeavoured to state. The prosecuting authority never went beyond what was proper in the circumstances of this case.

Before parting with this case, I should like to say this, if I may: providing that the offences are not grave ones and that the powers of the justices vis-a-vis sentence are appropriate, there is no reason why the prosecuting authority should not charge and offence which is not the gravest possible allegation on the facts. There may be many reasons

for choosing a lesser charge, among other ones, speed of trial, sufficiency of proof, and trial summarily rather than on indictment. It is necessarily a matter of discretion and careful choice. It is not easy for a prosecuting authority to steer between Scylla and Charybdis, but it is a tolerably wide passage through which they have to navigate. Prosecuting authorities have the duty to exercise great care in selecting the proper charges to prefer in any case. While they must obviously avoid the type of error exemplified in *R. v. Bodmin Justices, ex parte McEwan* (7), to which reference has already been made, and in *R. v. Bennet* (6), nevertheless if, in reality, the offence is nothing more than can properly be dealt with summarily by the justices, then it is proper so to charge it, despite the fact that the defendant may thereby lose his right to trial by jury if, indeed, it is, on balance, properly to be described as a loss at all. It is, however, to be hoped that, where proper, the lesser charges will be preferred at the outset, and the sort of discussion we have had in these two matters may thereby be avoided.

In the upshot, these applicants will be refused.

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WEBSTER, J.: I agree.

Webster, J

Applicants refused.

Solicitors: *Boxall & Boxall*, for *Gedfrey Davis & Waitt*, Ramsgate; *Marshland & Barber*, Margate; *Richard A Crabb*, Maidstone.

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Reported by G.F.L. Bridgman, Esq., Barrister.

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HOUSE OF LORDS
(Lord Fraser of Tullybelton, Lord Elwyn-Jones, Lord Salmon,
Lord Scarman and Lord Roskill)
June 18, 1981

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FORREST v. BRIGHTON JUSTICES
HAMILTON v. MARYLEBONE MAGISTRATES' COURT

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Magistrates — Fine — Commitment — Defaulter serving term of imprisonment — Need for notice to defaulter — Criminal Justice Act, 1967, s.44(6)

On March 15, 1979, the appellant, F., pleaded guilty to several offences and was sentenced by magistrates to consecutive terms of imprisonment totalling twelve months. On April 4, when he was in prison, the same court issued a warrant for his imprisonment for a further period of 144 days consecutive to the sentences passed on March 15, in respect of his default in paying a large number of fines which had been imposed by various magistrates' courts on various dates. He was given no notice of the proceedings of April 4 and he had no opportunity of making representations to the court before it issued the warrant for his further imprisonment. An appeal by him to a Divisional Court for an order to quash the order of April 4 was dismissed and he appealed to the House of Lords.

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Held: one of the principles of natural justice was that a person was entitled to adequate notice and opportunity before any judicial order was pronounced against him so that he or someone on his behalf might make such representations as were thought fit unless the application of that rule to a particular class of proceedings had been excluded expressly or impliedly by statute; it had been contended that the effect of s.44(6) of the Criminal Justice Act, 1967, was to dispense with the need for any hearing before fixing a term of imprisonment or issuing a warrant for imprisonment, but, while the effect of s.44(6) was that where an offender was serving a term of imprisonment a warrant for his commitment for default in payment of a fine might be issued without the necessity of a hearing at which the offender was present, the subsection did not provide or imply that a warrant for commitment might be issued without any notice being given to an offender that a procedure was about to take place in a magistrates' court which might result in his being committed to prison for a period consecutive to the sentence which he was already serving; a requirement of "presence" was a very different thing from a requirement of notice; s.44(6) could not be read as dispensing with a hearing altogether or with the need to give notice of it to the offender; the order appealed from would be set aside.

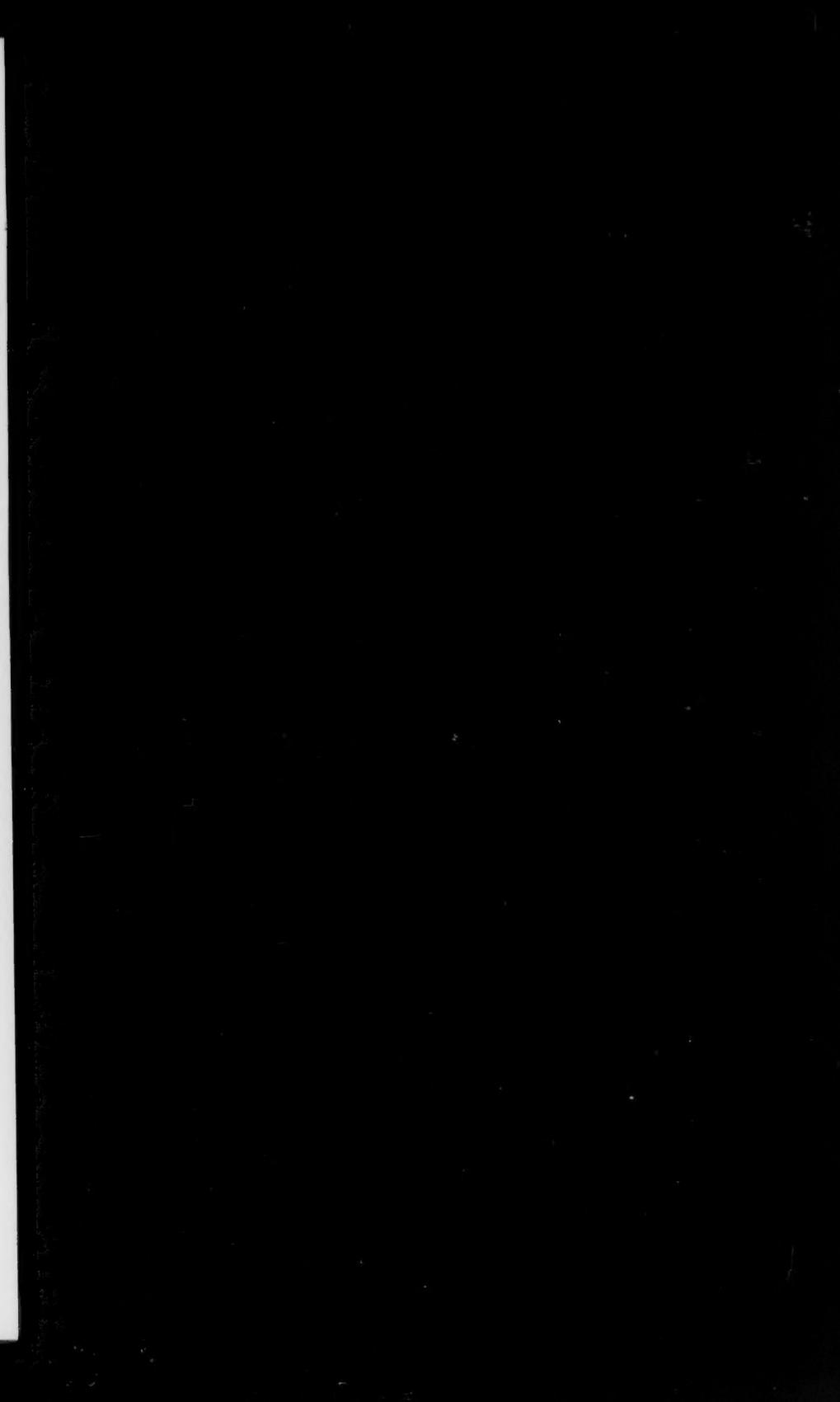
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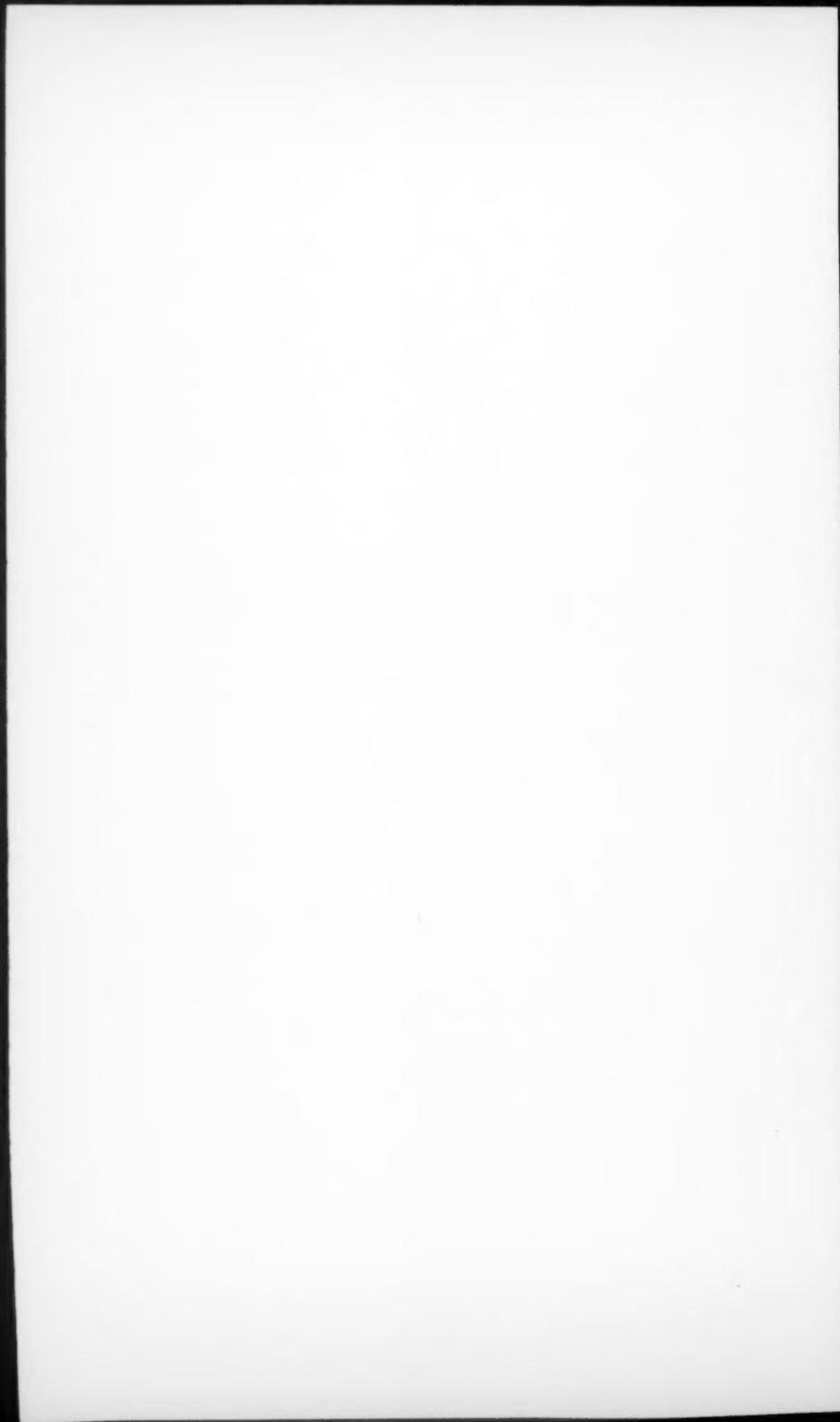
Mutatis mutandis the same issues were raised in an appeal by Michael Hamilton against a decision of the Divisional Court refusing his application for judicial review of an order at Marylebone Magistrates' Court, and that order also was set aside.

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Magistrates — Sentence — Imprisonment — Restriction on imprisonment — Consecutive terms — Magistrates' Act, 1952, s.108(2).

A further question was raised on behalf of the appellant F who contended that the magistrates, having sentenced him on March 15, 1979, to consecutive terms of imprisonment amounting to a total of twelve months, acted ultra vires in imposing an additional period of 144 days imprisonment for default





in payment of fines, the total of all the sentences imposed on March 15 and April 4 exceeding the maximum of twelve months which they were entitled to impose under s.108(2) of the Magistrates' Courts Act, 1952. On this further ground he appealed to a Divisional Court to quash the order of April 4. The Divisional Court dismissed the appeal, and the appellant appealed to the House of Lords.

Held: section 108(2) of the Act of 1952 did not limit the power of the magistrates' court to impose sentences of a total amount of more than twelve months in all circumstances; the subsection must be read as referring to imposing two or more terms of imprisonment on the same occasion.

Appeals by Peter Charles Forrest and Michael Francis Hamilton against decisions of Divisional Courts of the Queen's Bench Division.

N Nardeccia for the appellant Forrest.

G Bennett for the appellant Hamilton.

D Cocks for the Attorney General as *amicus curiae*.

The respondent did not appear.

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Their Lordships took time for consideration.

18th June, 1981. The following opinions were delivered.

LORD FRASER OF TULLYBELTON. My Lords, these appeals were heard together. They raise two questions, one of which is common to both appeals, and the other of which arises only in the case of Forrest, I will consider the common point first.

On 15th March, 1979, the appellant Peter Forrest pleaded guilty to several offences and was sentenced by the magistrates' court in Brighton to consecutive terms of imprisonment totalling twelve months. On 4th April, 1979, when he was, of course, in prison, the same court issued a warrant for his imprisonment for a further period of 144 days consecutive to the sentences passed on 15th March, in respect of his default in paying a large number of fines which had been imposed by various magistrates' courts on various dates since 1975. He was given no notice of the proceedings on 4th April, and he had no opportunity of making representations to the court before it issued the warrant for his further imprisonment. The first that he knew of the matter was after the court proceedings on 4th April, when he was informed by the governor of the prison where he was then serving his sentence of twelve months that the warrant had been issued and that he would have to serve an additional 144 days. He applied to the Divisional Court for an order to quash the order of 4th April on two grounds, the first of which was that the magistrates had erred in law in committing him to prison without giving him any notice or warning of the hearing on that day. When his application came before the Divisional Court (Ormrod L.J., and Lloyd, J.) that court felt itself bound by an earlier decision of the Divisional Court in *R. v. Dudley Magistrates' Court, ex parte Payne* (1) to dismiss the application. But Ormrod, L.J., with whose opinion Lloyd, J. agreed, said that he arrived at his

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conclusion 'with both surprise and some considerable measure of regret'.

The facts in the appeal by Michael Hamilton do not differ in any relevant respect from those in Forrest's case, although they are perhaps more striking because of the long period which they span. In August, 1971, the appellant Hamilton entered into a personal recognisance of £100 to appear at Marylebone Magistrates' Court about a month later in answer to a charge under the Forgery Act, 1913. He did not appear, having gone abroad, but on 23rd March, 1978, he was eventually brought before the court. On 23rd May, 1978, the court ordered that his recognizance be forfeited, giving him seven days to pay. The appellant failed to pay, and on 12th July, 1979, the magistrates' court fixed a period of thirty days as the period to be served in default of payment in accordance with the Magistrates' Courts Act, 1952, s.65(2). By 12th July, 1979, the appellant was serving a sentence of five years' imprisonment in respect of another offence and he failed to pay the £100 recognisance. On 22nd October, 1979, the same court issued a warrant committing the appellant to prison for a period of thirty days, to be consecutive to the period of five years imprisonment which he was then serving, and because he was in prison no inquiry into his means had to be held or was held: see s.44(4) and (6) of the Criminal Justice Act, 1967. The appellant was given no notice of the proceedings in the Marylebone court on either 12th July or 22nd October, 1979. He applied to the Divisional Court for an order of certiorari to quash the orders made by the magistrates on those dates. His application, like that of the appellant Forrest, was refused by the Divisional Court, consisting on this occasion of Lord Lane, C.J., and Comyn, J. The opinion of the court was given by Comyn, J., who said that the court was bound by the decision in *R. v. Dudley Magistrates' Court* (1) 'however difficult we may find it to accept the majority ruling'. Lord Lane, C.J., agreed with that opinion and said that he felt the same 'hesitation' as Comyn, J.

In the light of these expressions of opinion by the (differently constituted) Divisional Courts in the instant appeals, and having regard to the fact that the decision in *R. v. Dudley Magistrates' Court* (1) was by a majority (Michael Davies, J. and Lord Widgery, C.J.) and that a strong dissenting opinion was expressed by Robert Goff, J., the soundness of that decision clearly merits consideration.

The appellants may not be deserving of much sympathy, but the question whether they were entitled to notice of the proceedings in the magistrates' courts concerning them respectively raises an issue of some constitutional importance. One of the principles of natural justice is that a person is entitled to adequate notice and opportunity to be heard before any judicial order is pronounced against him, so that he, or someone acting on his behalf, may make such representations, if any, as he sees fit. That is the rule of *audi alteram partem* which applies to all judicial proceedings, unless its application to a particular class of proceedings has been excluded by Parliament expressly or by

necessary implication. That principle has often been stated, nowhere more clearly than in the passage cited in *R. v. Dudley Magistrates' Court* (1) from *Bonaker v. Evans* (2) by Parke, B., as follows:

'no proposition can be more clearly established than that a man cannot incur the loss of liberty or property for an offence by a judicial proceeding until he has had a fair opportunity of answering the charge against him, unless the legislature has expressly or impliedly given an authority to act without that necessary preliminary.'

It was because the learned judges who considered the instant appeals in the Divisional Court were conscious of that rule that they expressed the surprise and hesitation they did at the decisions to which they felt themselves driven by authority. But counsel who appeared as *amicus curiae*, while accepting (rightly in my opinion) that the proceedings in which magistrates fixed the term of imprisonment in default of payment and issued warrants for committal were judicial proceedings, argued that the application of the rule had been excluded by necessary implication in the legislation which applies to these appeals.

The power of magistrates to commit to prison for default in payment of fines is derived from the Magistrates' Courts Act, 1952, s.64 (1), which, so far as relevant, provides that

'where default is made in paying a sum adjudged to be paid by a conviction or order of a magistrates' court, the court may issue a warrant . . . committing the defaulter to prison.'

That power is subject to certain limitations which are now set out in s.44 of the Criminal Justice Act, 1967, in several subsections which apply to various circumstances in which the power may fall to be exercised. The subsection relevant here is sub-s (6) which provides as follows:

'After the occasion of an offender's conviction by a magistrates' court, the court shall not, unless — (a) the court has previously fixed a term of imprisonment under s.65(2) of the Magistrates' Courts Act, 1952, which is to be served by the offender in the event of a default in paying a sum adjudged to be paid by the conviction; or (b) the offender is serving a term of imprisonment or detention in a detention centre; issue a warrant of commitment for a default in paying the sum or fix such a term at a hearing at which the offender is present . . .'

The argument which was accepted by the majority in *R. v. Dudley Magistrates' Court* (1) and which was advanced by counsel who appeared as *amicus curiae* in the present case, was that the effect of that subsection was to dispense with the need for any hearing before fixing

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(1) 143 JP 393; [1979] 2 All ER 1089

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a term of imprisonment or issuing a warrant for imprisonment in the case of an offender who was already serving a term of imprisonment. Michael Davies, J., giving the opinion of the court in *R. v. Dudley Magistrates' Court* (1) after quoting the passage which I have quoted above from *Bonaker v. Evans* (2):

'As I have already said, in my view it is quite plain that the legislature by s.44(6) gave the justices express authority to issue a warrant of commitment in circumstances such as these [i.e. where the offender is serving a term of imprisonment] without a hearing and in my judgment it follows that the legislature also bestowed on the justices an implied authority to do so without notice to the individual concerned. So there was no breach of the rules of natural justice. That, in my judgment, is sufficient to dispose of the short point in this application.'

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With the greatest respect to the learned judge, I am unable to accept that view. The effect of s.44(6) is (relevantly) that, where an offender is serving a term of imprisonment, a warrant for his commitment for a default in paying a fine may be issued without the necessity of 'a hearing at which the offender is present'. That is to say, a hearing can proceed in the absence of the offender. But the subsection does not provide, nor, in my opinion, does it imply, that a warrant for commitment may be issued without any hearing at all. Still less does it provide or imply that no notice need be given to an offender that procedure is about to take place in the magistrates' court which may result in his being committed to prison for a period consecutive to the sentence which he is already serving. I agree with the dissenting opinion of Robert Goff, J., in *R. v. Dudley Magistrates' Court* (1) and particularly with the passage where he says:

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'In my judgment, a requirement of "presence" is a very different thing from a requirement of "notice" . . . sub-section (6) means, in my judgment, what it says, that except in the two excluded cases, the actual presence of the offender is required at the hearing before a warrant of commitment is issued. That is because, except in the two excluded cases, a means enquiry must take place and for that purpose the offender has to attend the hearing.'

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The reason why a means inquiry is not required in the case of an offender who is serving a sentence of imprisonment probably is that the majority of such offenders who have defaulted in paying fines have no substantial means, so that the inquiry would be futile. An additional reason may be that any period of imprisonment for default in paying fines will generally be ordered to run concurrently with the sentence which the offender is already serving, so that its length will have little practical effect on him. However that may be, s.44(6) of the 1967 Act is not, in my opinion, capable of being read as dispensing with a

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hearing altogether or with the need to give notice of it to the offender. It dispenses only with the need for his actual presence, and on a matter of constitutional importance such as this, its meaning ought not to be stretched in such a way as to prejudice the offender. In many cases he may have no excuse to offer to defaulting in payment, and, if he neither appears in person or by a representative, nor sends a written explanation, the 'hearing' will in practice consist simply of the magistrates making an appropriate order. But, if he makes any representations either personally, or through another person, or in writing, he is entitled to have them taken into consideration by the magistrates before they make an order. An obvious example of the type of representation that might be made is that any period of imprisonment should run concurrently with his current sentence, on the ground that his default in paying the fine had been due to some cause which was not his fault, such as ill health or loss of his job. Another possible type of representation was suggested by a case that was mentioned in argument to us, *R. v. Southampton Justices, ex parte Davies* (3) where the Divisional Court (Donaldson, L.J., and Forbes, J.) considered the proper method of computing the maximum period of imprisonment that might be imposed by magistrates for default in paying fines. If that case was rightly decided, the calculation in Forrest's case was made on a wrong basis, and the period of 144 days imposed on him exceeded the proper maximum which was only 90 days. Counsel who appeared as amicus curiae conceded that *R. v. Southampton Justices* (3) had been rightly decided, and counsel for Forrest naturally accepted the concession, but as I am not at present satisfied that the reasoning underlying the decision is correct and as we have not heard full argument on the question, I would reserve my opinion on it. The relevance of the case is only to show that an offender who is in prison may have a real practical interest in making representations to the court before a term of imprisonment is imposed on him for default in paying fines.

I would accordingly answer the first of the certified questions in the appeal by Forrest and the only certified question in the appeal by Hamilton in the negative.

The second question which is raised on behalf of the appellant Forrest is whether the magistrates, having sentenced the appellant on 15th March, 1979, to consecutive terms of imprisonment amounting in total to twelve months, were entitled to impose an additional period of 144 days imprisonment on 4th April, 1979, for default in payment of fines. Counsel for the appellant argued that the magistrates had acted ultra vires on 4th April in respect that the total of all the sentences imposed on that date and on 15th March exceeded twelve months which was the maximum they were entitled to impose under the Magistrates' Courts Act, 1952, s.108(2). He submitted that the fact that the 144 days had been imposed on a different day from the twelve months was immaterial and that the total of all sentences, current or pending, imposed by the magistrates was the relevant figure. On the facts of this case, it was enough for counsel for appellant to

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submit, as he did, that the maximum of six months under sub-s (1) of s.108 or twelve months under sub-s (2) applied to the aggregate of the terms of imprisonment imposed by any one magistrates' court, but, as counsel who appeared as *amicus curiae* pointed out, it might be argued that the maximum applied to the aggregate of all terms imposed by any magistrates' court. Whichever form the argument takes it depends on the provisions of s.108 and particularly on the latter part of sub-s (1). That subsection provides as follows:

'A magistrates' court imposing imprisonment on any person may order that the term of imprisonment shall commence on the expiration of any other term of imprisonment imposed by that or any other court; but where a magistrates' court imposes two or more terms of imprisonment to run consecutively the aggregate of such terms shall not, subject to the provisions of this section, exceed six months.'

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The first part of that subsection down to the semicolon contains nothing to suggest that the date on which the 'other term of imprisonment' was imposed is material. If it was imposed by 'the court' (i.e. by the magistrates' court itself) that might have been either on the same occasion as the sentence which is to be consecutive to it is imposed, or on an earlier occasion. But if it was imposed by 'any other court' it must have been imposed on an earlier occasion. When one comes to the second part of sub-s (1), after the semicolon, the provision is applicable where a magistrates' court 'imposes two or more terms of imprisonment to run consecutively' and in my opinion the natural and plain meaning of those words is to read them as referring to imposing two or more terms of imprisonment on the same occasion. I agree with Ormrod, L.J., and Lloyd, J., that the subsection, on its natural reading, does not limit the power of the magistrates' court to imposing sentences of a total amount of 6 months or 12 months in all circumstances. If it had done so, it would have been inconsistent with the policy given effect to by sub-s (4) and while that is not impossible it is unlikely.

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I recognise that the result of construing the subsection in the way that I consider to be correct is to leave room for what may seem to be an anomaly; provided that sentences are imposed on different days there is, in theory, no limit to the aggregate of the terms of imprisonment that a magistrates' court may impose. But that is only theoretical, because in practice if the aggregate were going to be greatly in excess of 6 months or 12 months, as the case may be, the magistrates' court would remit the case to a higher court for sentence. In any event, I regard the construction of sub-s (1), which is the only subsection relevant for this purpose, as too plain to be shaken by consequences which may seem to some extent anomalous. I am fortified in that opinion by the decision of the Divisional Court in the instant appeal by Forrest, and also by the decisions in *R. v. Metropolitan Stipendiary Magistrate for South Westminster, ex parte Green* (4), where the

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judgment was given by May, J., with whom Lord Widgery, C.J., and Croom-Johnson, J concurred, and in the unreported case of *R. v. Uxbridge Justices, ex parte Fisc* (5) where the judgment of the court, consisting of Lord Widgery, C.J., and May, J., was again given by May, J.

I would answer the second question in Forrest's appeal in the affirmative, and for these reasons I would allow both appeals.

LORD ELWYN-JONES: I have had the advantage of reading in draft the speech of my noble and learned friend Lord Fraser. For the reasons he gives I would answer the two certified questions he proposes. Accordingly, I would allow the two appeals.

LORD SALMON: I have had the advantage of reading in draft the speech of my noble and learned friend Lord Fraser. For the reasons he has given I would answer the two certified questions as he proposes. Accordingly, I too would allow the two appeals.

LORD SCARMAN: I have had the advantage of reading in draft the speech delivered by my noble and learned friend Lord Fraser. For the reasons he gives I would answer the two certified questions as he proposes. Accordingly, I would allow the two appeals.

LORD ROSKILL: I have had the advantage of reading in draft the speech of my noble and learned friend Lord Fraser. For the reasons he gives I agree that both appeals should be allowed. I desire to record my respectful agreement with the comment which my noble and learned friend makes on the reasoning underlying the decision in *R. v. Southampton Justices, ex parte Davies* (3).

Solicitors: *Selwood, Leathes & Hooper*, Brighton; *Gentle, Mathias & Co*; Treasury Solicitor.

Reported by G.F.L. Bridgman, Esq., Barrister.

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HOUSE OF LORDS
(Lord Diplock, Lord Fraser of Tullybelton,
Lord Russell of Killowen, Lord Keith of Kinkel, and Lord Roskill)
June 25, 1981

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Criminal Law — Obtaining pecuniary advantage by deception — Dishonest use of credit card — Goods obtained from retailer on representation of authority to make contract with retailer on behalf of bank — Proof of inducement — Inference — Theft Act, 1967, s.16(1).

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On April 20, 1977 the respondent was issued by Barclay's Bank with a credit card an express condition of which was that it should be used only within the respondent's credit limit of £200. No complaint was made of the respondent's use of the card until November 18, 1977, between which date and December 15, 1977 she used the card on at least 67 occasions thereby incurring a total debt to the bank of £1005. On December 15 she visited a shop (M), produced the card to a departmental manager who checked inter alia that the card was current in date, completed the voucher relating to the transaction, and allowed the respondent to take away goods which she had selected to the value of £10.25. On August 1, 1979, she was charged in the Crown Court with dishonestly obtaining on two occasions a pecuniary advantage by deception contrary to s.16(1) of the Theft Act, 1968. On the first charge she was acquitted, but she was convicted on the second charge which related to the transaction at the M shop. She appealed to the Court of Appeal on the ground that there was no evidence that the manager at the M shop was induced by a false representation that the respondent's credit at the bank gave her authority to use the card. The Court of Appeal allowed her appeal, and the Crown appealed to the House of Lords.

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Held: the representation arising from the presentation of a credit card had nothing to do with the respondent's credit standing at the bank but was a representation of authority to make the contract with M on the bank's behalf that the bank would honour the voucher on presentation; it had been contended that there was no adequate proof that the manager of M had been induced by the representation to complete the transaction and allow the respondent to take away the goods but reliance on a dishonest representation could be sufficiently established by proof of facts from which an irresistible inference of such reliance could be drawn; the appeal would be allowed and the conviction of the respondent on the second count in the indictment would be restored.

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Appeal by the prosecution against a decision of the Criminal Division of the Court of Appeal quashing the conviction of Shiralee Ann Lambie for offence against s.16(1) of the Theft Act, 1967.

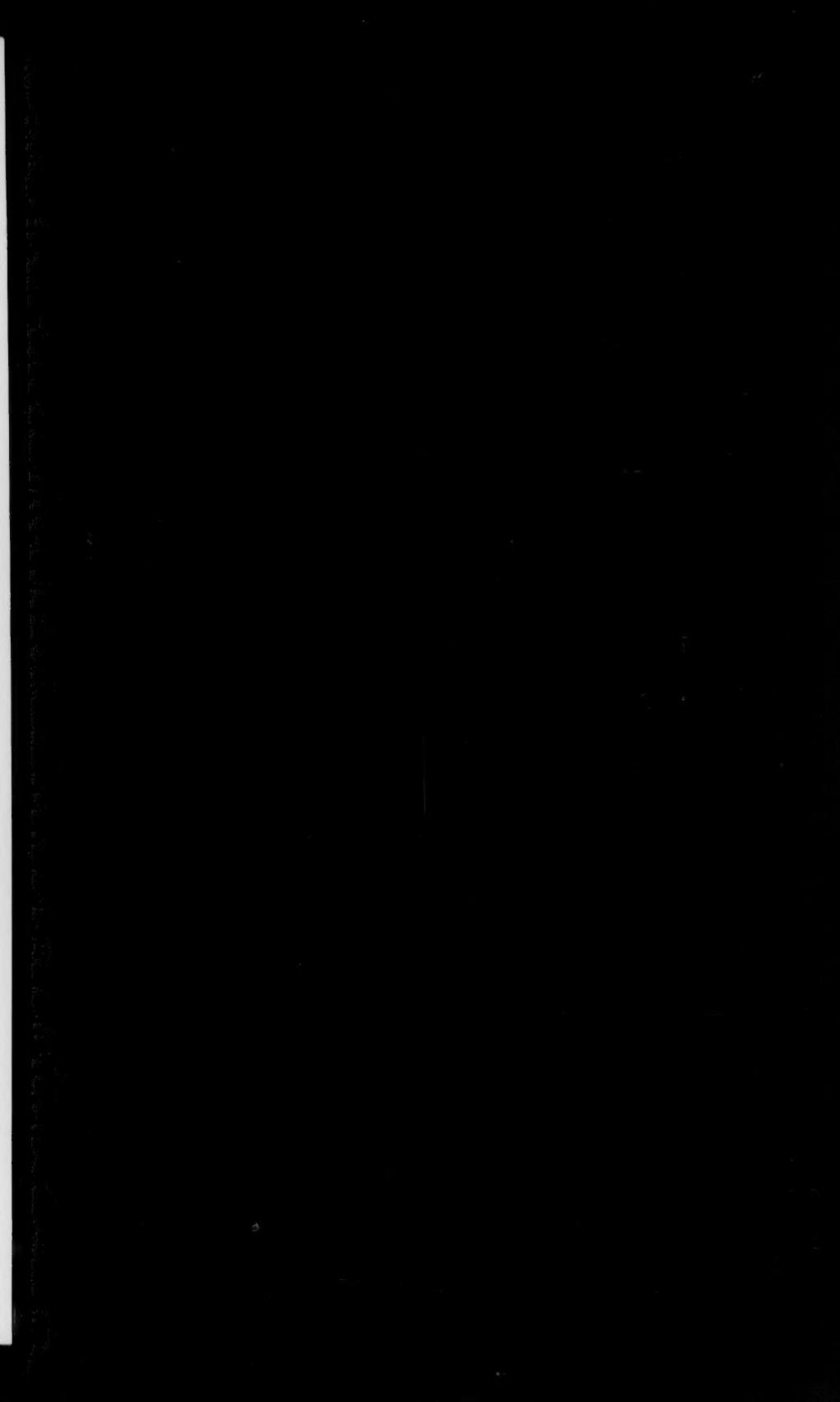
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R Curtiss QC and M Pert for the Crown.
P Back QC and J Plumstead for the respondent.

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Their Lordships took time for consideration.

25th June, 1981. The following opinions were delivered.





LORD DIPLOCK: My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Roskill. I agree with it and would allow the appeal.

LORD FRASER OF TULLYBELTON: I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Roskill. I agree with it and for the reasons stated therein I would answer the certified question in the negative and allow this appeal.

LORD RUSSELL OF KILLOWEN: I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Roskill. I agree with it and that this appeal should be allowed.

LORD KEITH OF KINKEL: For the reasons given in the speech of my noble and learned friend Lord Roskill, which I have had the opportunity of reading in draft and with which I entirely agree, I too would allow the appeal.

LORD ROSKILL: My Lords, on 20th April, 1977, the respondent was issued by Barclays Bank Ltd ('the bank') with a Barclaycard ('the card'). That card was what today is commonly known as a credit card. It was issued subject to the Barclaycard current conditions of use, and it was an express condition of its issue that it should be used only within the respondent's credit limit. That credit limit was £200 as the respondent well knew, since that figure had been notified to her in writing when the card was issued. The then current conditions of use included an undertaking by the respondent, as its holder, to return the card to the bank on request. No complaint was, or indeed could be, made of the respondent's use of the card until 18th November, 1977. Between that date and 5th December, 1977, she used the card for at least 24 separate transactions, thereby incurring a debt of some £533. The bank became aware of this debt and thereupon sought to recover the card. On 6th December, 1977, the respondent agreed to return the card on 7th December, 1977. She did not, however, do so. By 15th December, 1977 she had used the card for at least 43 further transactions, incurring a total debt to the bank of £1,005.26.

On 15th December, 1977 the respondent entered into the transaction out of which this appeal arises. She visited a Mothercare shop in Luton. She produced the card to a departmental manager at Mothercare named Miss Rounding. She selected goods worth £10.35. Miss Rounding completed the voucher, checked that the card was current in date, that it was not on the current stop list, and that the respondent's signature on the voucher corresponded with her signature on the card. Thereupon, the respondent took away the goods which she had selected. In due course, Mothercare sent the voucher to the bank and were paid £10.35 less the appropriate commission charged by the bank. On 19th December, 1977, the respondent returned the card to the bank.

At her trial at the Crown Court at Bedford on 1st and 2nd August, 1979 before his Honour Judge Counsell and a jury, the respondent faced two charges of obtaining a pecuniary advantage by deception

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contrary to s.16(1) of the Theft Act 1968. These were specimen charges. The first related to an alleged offence on 5th December, 1977, and the second to the events which took place at the Mothercare shop at Luton which I have just related. The particulars of each charge were that she dishonestly obtained for herself a pecuniary advantage 'namely, the evasion of a debt for which she then made herself liable by deception, namely, by false representations that she was authorised to use a Barclaycard . . . to obtain goods to the value of £10.35'.

The jury acquitted the respondent on the first charge. She was, however, convicted on the second. The evidence of dishonesty in relation to the Mothercare transaction which was the subject of the second charge was overwhelming, and before your Lordships' House counsel for the respondent did not seek to suggest otherwise. Presumably the acquittal on the first count was because the jury were not certain that at the earlier date, 5th December, 1977, the respondent was acting dishonestly.

My Lords, during the hearing in this House your Lordships inquired of counsel for the appellant prosecutor why no count of obtaining property by deception on 15th December, 1977, contrary to s.15 of the Theft Act, 1968, had been included in the indictment. Your Lordships were told that such a charge had indeed been preferred at the magistrates' court during the committal proceedings but it had been rejected by the magistrates on a submission made on behalf of the respondent during those proceedings. My Lords, if this be so, I find it difficult to see on what basis such a submission could properly have succeeded, or what defence there could have been had such a charge been the subject of a further count in the indictment once the jury were convinced, as they were, of the respondent's dishonesty on 15th December, 1977. Had that course been taken, the complications which in due course led to the Court of Appeal, Criminal Division, quashing the conviction on the second count, and consequently, to the prosecutor's appeal to this House, with your Lordships' leave, following the grant of a certificate by the Court of Appeal, Criminal Division, would all have been avoided. But the course of adding a count charging an offence against s.15 of the Theft Act, 1968, was not followed, and accordingly your Lordships have now to determine whether the Court of Appeal, Criminal Division, was correct in quashing the conviction on the second count. If it was, then, as that court recognised in the concluding paragraph of its judgment, a gateway to successful fraud has been opened for the benefit of the dishonest who in circumstances such as the present cannot be proceeded against and punished at least for offences against s.16 of the Theft Act, 1968.

The committal proceedings were what is sometimes called 'old fashioned', that is to say, that advantage was not taken of s.1 of the Criminal Justice Act, 1967. Witnesses were called in the magistrates' court and cross-examined. These witnesses included Miss Rounding, the departmental manager. Your Lordships were shown a copy of her deposition. Miss Rounding was not called at the trial at the Crown Court. Her deposition was read to the jury. It emerged from her evidence, and other evidence given or read, that, as one would expect, there was an agreement between Mothercare and the bank. That agree-

ment does not appear to have been properly proved at the trial, but, by consent, your Lordships were given a pro forma copy of what is known as a 'merchant member agreement' between the bank and its customer, setting out the conditions on which the customer will accept and the bank will honour credit cards such as Barclaycards.

At the close of the case for the prosecution, counsel for the respondent invited the judge to withdraw both counts from the jury on, it seems from reading the judge's clear ruling on this submission, two grounds: first, that as a matter of law there was no evidence from which a jury might properly draw the inference that the presentation of the card in the circumstances I have described was a representation by the respondent that she was authorised by the bank to use the card to create a contract to which the bank would be a party, and, secondly, that as a matter of law there was no evidence from which a jury might properly infer that Miss Rounding was induced by any representation which the respondent might have made to allow the transaction to be completed and the respondent to obtain the goods. The foundation for this latter submission was that it was the existence of the agreement between Mothercare and the bank that was the reason for Miss Rounding allowing the transaction to be completed and the goods to be taken by the respondent, since Miss Rounding knew of the arrangement with the bank, so that Mothercare was in any event certain of payment. It was not, it was suggested, any representation by the respondent which induced Miss Rounding to complete the transaction and to allow the respondent to take the goods. The judge rejected these submissions. He was clearly right to do so, as indeed was conceded in argument before your Lordships' House, if the decision of this House in *Metropolitan Police Commissioner v. Charles* (1) is of direct application. In that appeal this House was concerned with the dishonest use, not as in the present appeal of a credit card, but of a cheque card. The appellant defendant was charged and convicted on two counts of obtaining a pecuniary advantage by deception, contrary to s.16 of the Theft Act, 1968. The Court of Appeal, Criminal Division, and your Lordships' House both upheld those convictions. Your Lordships unanimously held that where a drawer of a cheque which is accepted in return for goods, services or cash, uses a cheque card he represents to the payee that he has the actual authority of the bank to enter on its behalf into the contract expressed on the card that it would honour the cheque on presentation for payment.

I venture to quote in their entirety three paragraphs from the speech of my noble and learned friend Lord Diplock which, as I venture to think, encapsulate the reasoning of all those members of your Lordships' House who delivered speeches:

'When a cheque card is brought into the transaction, it still remains the fact that all the payee is concerned with is that the cheque should be honoured by the bank. I do not think that the fact that a cheque card is used necessarily displaces the representation to be implied from the act of drawing the cheque which has just been

(1) 140 JP 531; [1977] AC 177

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mentioned. It is, however, likely to displace that representation at any rate as the main inducement to the payee to take the cheque, since the use of the cheque card in connection with the transaction gives to the payee a direct contractual right against the bank itself to payment on presentment, provided that the use of the card by the drawer to bind the bank to pay the cheque was within the actual or ostensible authority conferred on him by the bank.

'By exhibiting to the payee a cheque card containing the undertaking by the bank to honour cheques drawn in compliance with the conditions endorsed on the back and drawing the cheque accordingly, the drawer represents to the payee that he has actual authority from the bank to make a contract with the payee on the bank's behalf that it will honour the cheque on presentment for payment.

'It was submitted on behalf of the accused that there is no need to imply a representation that the drawer's authority to bind the bank was actual and not merely ostensible, since ostensible authority alone would suffice to create a contract with the payee that was binding on the bank; and the drawer's possession of the cheque card and the cheque book with the bank's consent would be enough to constitute his ostensible authority. So, the submission goes, the only representation needed to give business efficacy to the transaction would be true. This argument stands the doctrine of ostensible authority on its head. What creates ostensible authority in a person who purports to enter into a contract as agent for a principal is a representation made to the other party that he has the actual authority of the principal for whom he claims to be acting to enter into the contract on that person's behalf. If (1) the other party has believed the representation and on the faith of that belief has acted on it and (2) the person represented to be his principal has so conducted himself towards that other party as to be estopped from denying the truth of the representation, then, and only then, is he bound by the contract purportedly made on his behalf. The whole foundation of liability under the doctrine of ostensible authority is a representation, believed by the person to whom it is made, that the person claiming to contract as agent for a principal has the actual authority of the principal to enter into the contract on his behalf'.

If one substitutes in the passage the words 'to honour the voucher' for the words 'to pay the cheque', it is not easy to see why mutatis mutandis the entire passages are not equally applicable to the dishonest misuse of credit cards as to the dishonest misuse of cheque cards. But the Court of Appeal in a long and careful judgment delivered by Cuming-Bruce LJ felt reluctantly impelled to reach a different conclusion. The crucial passage in the judgment which the learned lord justice delivered reads thus:

'We would pay tribute to the lucidity with which the learned judge presented to the jury the law which the House of Lords had declared in relation to deception in a cheque card transaction. If that analysis can be applied to this credit card deception, the sum-

ming-up is faultless. But, in our view, there is a relevant distinction between the situation described in *Metropolitan Police Commissioner v. Charles* (1) and the situation devised by Barclays Bank for transactions involving use of their credit cards. By their contract with the bank, Mothercare had bought from the bank the right to sell goods to Barclaycard holders without regard to the question whether the customer was complying with the terms of the contract between the customer and the bank. By her evidence Miss Rounding made it perfectly plain that she made no assumption about the appellant's credit standing at the bank. As she said: "The company rules exist because of the company's agreement with Barclaycard". The flaw in the logic is, in our view, demonstrated by the way in which the judge put the question of the inducement of Miss Rounding to the jury: "Is that a reliance by her, Miss Rounding of Mothercare, on the presentation of the card as being due authority *within the limits as at that time as with count 1?*" In our view, the evidence of Miss Rounding could not find a verdict that necessarily involved a finding of fact that Miss Rounding was induced by a false representation that the appellant's credit standing at the bank gave her authority to use the card'.

I should perhaps mention, for the sake of clarity, that the person referred to as the appellant in that passage is the present respondent.

It was for that reason that the Court of Appeal, Criminal Division, allowed the appeal, albeit with hesitation and reluctance. That court accordingly certified the following point of law as of general public importance, namely:

'In view of the proved differences between a cheque card transaction and a credit card transaction, were we right in distinguishing this case from that of *Metropolitan Police Commissioner v. Charles* (1) on the issue of inducement?'

My Lords, as the appellant says in his printed case, the Court of Appeal, Criminal Division, laid too much emphasis on the undoubtedly, but to my mind irrelevant, fact that Miss Rounding said she made no assumption about the respondent's credit standing with the bank. They reasoned from the absence of assumption that there was no evidence from which the jury could conclude that she was 'induced by a false representation that the [respondent's] credit standing at the bank gave her authority to use the card'. But, my Lords, with profound respect to Cumming-Bruce LJ, that is not the relevant question. Following the decision of this house in *Charles* (1), it is in my view clear that the representation arising from the presentation of a credit card has nothing to do with the respondent's credit standing at the bank but is a representation of actual authority to make the contract with, in this case, Mothercare, on the bank's behalf that the bank will honour the voucher on presentation. On that view, the existence and terms of

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the agreement between the bank and Mothercare are irrelevant, as is the fact that Mothercare, because of that agreement, would look to the bank for payment.

That being the representation to be implied from the respondent's actions and use of the credit card, the only remaining question is whether Miss Rounding was induced by that representation to complete the transaction and allow the respondent to take away the goods. If she had been asked whether, had she known the respondent was acting dishonestly and, in truth, had no authority whatever from the bank to use the credit card in this way, she (Miss Rounding) would have completed the transaction, only one answer is possible: 'No'. Had an affirmative answer been given to this question, Miss Rounding would, of course, have become a participant in furtherance of the respondent's fraud and a conspirator with her to defraud both Mothercare and the bank. Leading counsel for the respondent was ultimately constrained, rightly as I think, to admit that had that question been asked of Miss Rounding and answered, as it must have been, in the negative, this appeal must succeed. But both he and his learned junior strenuously argued that, as Lord Edmund-Davies pointed out in his speech in *Charles* (1), the question whether a person is or is not induced to act in a particular way by a dishonest representation is a question of fact, and, since what they claimed to be the crucial question had not been asked of Miss Rounding, there was no adequate proof of the requisite inducement. In her deposition, Miss Rounding stated, no doubt with complete truth, that she only remembered this particular transaction with the respondent because someone subsequently came and asked her about it after it had taken place. Credit card frauds are all too frequently perpetrated, and if conviction of offenders for offences against s.15 or s.16 of the Theft Act, 1968, can only be obtained if the prosecution are able in each case to call the person on whom the fraud was immediately perpetrated to say that he or she positively remembered the particular transaction and, had the truth been known, would never have entered into that supposedly well-remembered transaction, the guilty would often escape conviction. In some cases, of course, it may be possible to adduce such evidence if the particular transaction is well remembered. But where as in the present case no one could reasonably be expected to remember a particular transaction in detail, and the inference of inducement may well be in all the circumstances quite irresistible, I see no reason in principle why it should not be left to the jury to decide, on the evidence in the case as a whole, whether that inference is in truth irresistible as to my mind it is in the present case. In this connection it is to be noted that the respondent did not go into the witness box to give evidence from which that inference might conceivably have been rebutted.

In this respect I find myself in agreement with what was said by Humphreys J giving the judgment of the Court of Criminal Appeal in *R. v. Sullivan* (2):

(1) 140 JP 531, [1977] AC 177

(2) (1945), 30 Cr. App. R 132

'It is, we think, undoubtedly good law that the question of the inducement acting upon the mind of the person who may be described as the prosecutor is not a matter which can only be proved by the direct evidence of the witness. It can be, and very often is, proved by the witness being asked some question which brings the answer: "I believed that statement and that is why I parted with my money"; but it is not necessary that there should be that question and answer if the facts are such that it is patent that there was only one reason which anybody could suggest for the person alleged to have been defrauded parting with his money, and that is the false pretence, if it was a false pretence.'

It is true that in *R. v. Laverty* (3) Lord Parker, CJ, said that the Court of Appeal, Criminal Division, was anxious not to extend the principle in *Sullivan* (2) further than was necessary. Of course, the Crown must always prove its case and one element which will always be required to be proved in these cases is the effect of the dishonest representation on the mind of the person to whom it is made. But I see no reason why in cases such as the present, where what Humphreys, J, called the direct evidence of the witness is not and cannot reasonably be expected to be available, reliance on a dishonest representation cannot be sufficiently established by proof of facts from which an irresistible inference of such reliance can be drawn.

I would answer the certified question in the negative and would allow the appeal and restore the conviction of the respondent on the second count in the indictment which she faced at the Crown Court.

Solicitors: *David Alterman & Sewell*, for *David Picton & Co*, Luton;
R H Lloyd & Co, St Albans.

Reported by G.F.L. Bridgman, Esq., Barrister.

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(2) (1945), 30 Cr. App. R 132

(3) 134 JP 699; [1970] 3 All ER 432

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QUEEN'S BENCH DIVISION
(Donaldson, L.J., and Bingham, J.)
February 4, 1981

R. v. HUNTINGDON CROWN COURT

i Crown Court – Jurisdiction – Plea of guilty before magistrates – Appeal to Crown Court – Contention that plea result of coercion – Jurisdiction of Crown Court to inquire into matter and remit case to magistrates.

ii

A wife and her husband both pleaded before magistrates to charges of stealing and were fined. The wife appealed to the Crown Court and there stated that she had committed the offences and pleaded guilty under the coercion of her husband. The Crown Court judge held that, assuming that those facts were established, there was no jurisdiction in the Crown Court to give her any relief. On an application for judicial review of that decision,

Held: whether the case was one of an equivocal plea or a case which was *sui juris* the Crown Court had jurisdiction and the case would be remitted to the Crown Court with a direction that it should investigate it.

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Per Curiam: If the Crown Court decided that the plea of guilty was produced by duress and that the matter should go back to the magistrates for re-hearing, the magistrates would be able to consider the mode of trial. They might well take the view that, if the appellant was acting under duress in pleading guilty, the same considerations might have applied to her consent to summary trial.

Application by Eileen June Jordan for judicial review of a decision of the Crown Court of Huntingdon.

O. Davies, for the applicant.

T. Barnes for the prosecution.

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Donaldson, L.J.

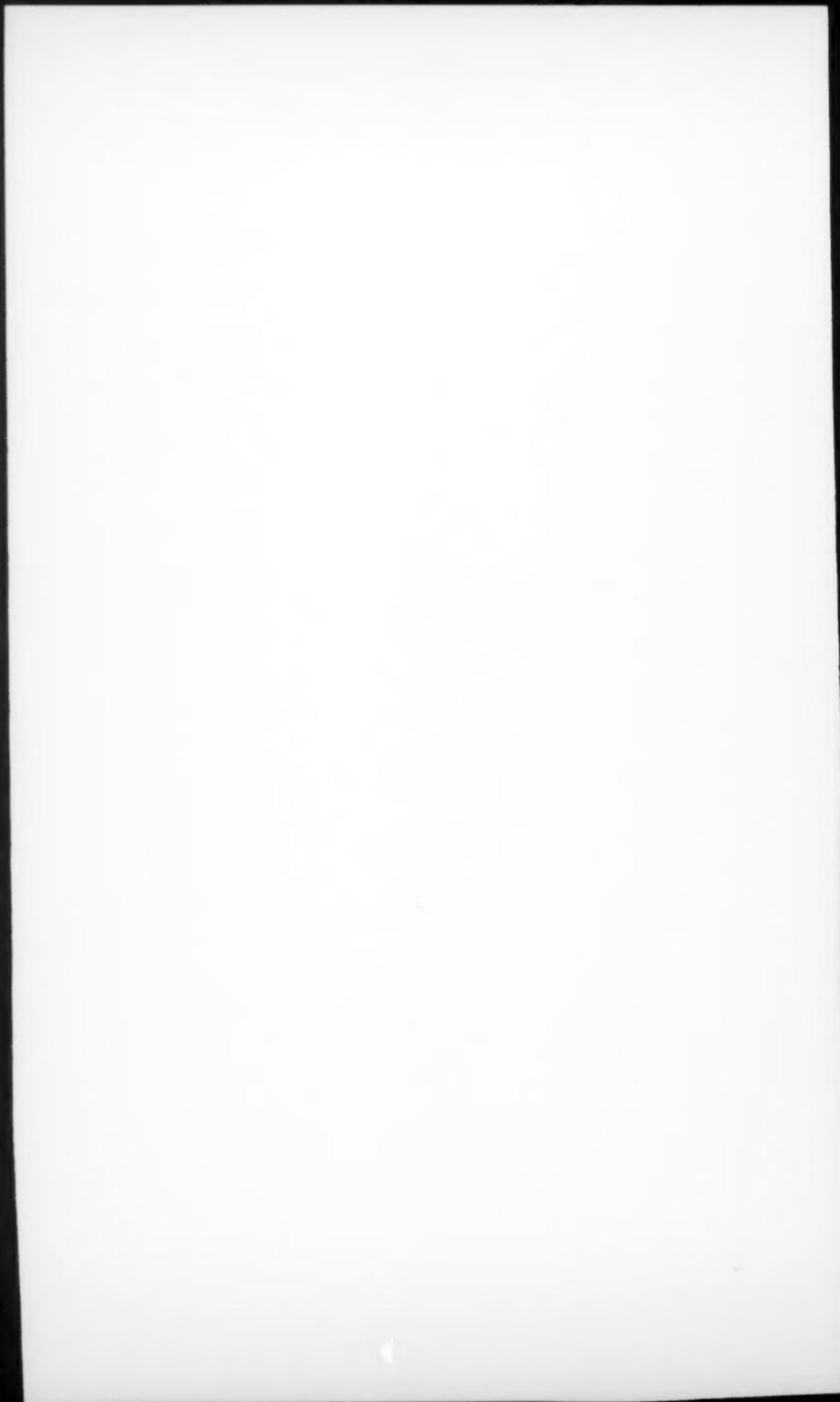
DONALDSON, LJ. This is an application for judicial review brought on behalf of Mrs Jordan, against the Crown Court at Huntingdon, seeking an order to quash a decision of the Crown Court by which it was held that it had no jurisdiction to deal with Mrs Jordan's application, to which I will come in a moment. First let me set the historical scene.

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Mrs Jordan appeared before the Peterborough magistrates on 6th September 1979 charged with theft. Charged with her was her husband. Both of them pleaded guilty to theft and indeed Mrs Jordan asked for eleven other offences to be taken into consideration. She was fined and so was her husband. Thus far there appears to be no ground for any appeal to the Crown Court so far as conviction is concerned. They were both convicted on their own pleas of guilty, and there was no apparent ground for coming to this court for any form of judicial review. But when Mrs Jordan appeared before the Crown Court on her own appeal, she wanted to put forward a somewhat unusual story, and the story was this. She wanted to say that in March 1977 she was married to David John Jordan her co-accused. He was suffering from some form of mental illness and throughout the marriage he ill-treated her in a

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most violent manner. She gives particulars of that. In January 1979 she had left her husband and indeed had taken the step of instructing solicitors to institute divorce proceedings. However in early August 1979 her husband discovered her whereabouts and persuaded her to return to him. He then took up his former habit of maltreating her, and in addition took to shoplifting. While out shopping together her husband threatened that he would physically ill-treat her if she gave information to anybody about his shoplifting, and further, under threat of physical violence, he required her to assist him with his shoplifting. She was so doing on 25th August when their activities were detected and it was that incident which led to this charge.

Under s.47 of the Criminal Justice Act 1925 a wife has a defence to a charge of this nature if she can prove that the offence was committed in the presence and under the coercion of her husband. It follows that if Mrs Jordan had raised these issues before the magistrates, they would, I have no doubt, have investigated them, and if she had been able to bring herself within s.47, she would have been entitled to be acquitted. But she did not raise the matter before the magistrates; she simply pleaded guilty. When she got to the Crown Court she then added the information (at least I assume that this was before the Crown Court) that her husband had threatened her in the magistrates' court, saying that he would physically ill-treat her if she did other than plead guilty. It is now said that while they were standing together and being asked how they pleaded he nudged her with his foot, or otherwise reminded her of the physical consequences which would follow if she entered a plea of not guilty. So she raises a submission that her plea of guilty, like the offence itself, was procured by duress.

The Crown Court judge held that, assuming that those facts were established (he did not investigate them), there was no jurisdiction in the Crown Court to give her any relief. The basis of that decision, as I understand it, was that the jurisdiction of the Crown Court, once there has been a plea of guilty accepted by the magistrates, is very limited. It can, of course, entertain an appeal against sentence. That is clear from s.83 of the Magistrates' Courts Act 1952. It can (this is established by a long line of cases) inquire to see whether there was a real plea of guilty, in the sense of inquiring whether the plea was equivocal.

An equivocal plea has been described by Lord Goddard, C.J, and by Lord Parker, C.J., when he succeeded him, as a 'guilty but' plea (see *R. v. Marylebone Justices, ex parte Westminster City Council*; *R. v. Inner London Quarter Sessions, ex parte Westminster City Council* (1). It is a common experience of all who sit in magistrates' courts that those who are charged with theft sometimes come forward and say: 'Yes, I plead guilty, because I took it, but I thought that it was mine', or 'I thought nobody would object', and all sorts of other excuses, some of which at least nullify the plea of guilty which has just been given. In those circumstances, where the magistrates recognise that an

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equivocal "guilty but" plea is being made, they quite rightly enter a peal of 'not guilty'. There is no doubt that the Crown Court has jurisdiction to investigate the matter where it is alleged that there has been an equivocal plea in that sense and, if satisfied that there was an equivocal plea, it can send the matter back to the magistrates to enable them in effect to rehear the case, because the plea should have been treated as one of not guilty. It is equally clear (it was made clear to us in argument here) that that situation is to be distinguished from the situation which arises where there is an unequivocal plea of guilty and at a later stage the accused person comes to the conclusion that he should never have pleaded guilty and he asks to be allowed to change his plea. In such cases magistrates have a discretion to allow a change of plea up to the time when sentence has been passed. There are also special situations where trial and sentence are split between the magistrates' court and the Crown Court, but I need not bother with that.

What is submitted in this case is that there is no way in which a Crown Court can intervene. It is said that if Mrs Jordan is seeking to change her plea, then she is too late. For my part I would accept that that is so. It is said that this is not a case of an equivocal plea. As to that I am not so sure. It may be a case of an equivocal plea or it may be a case which is *sui generis*. But whichever it be, I am satisfied that the Crown Court has jurisdiction to inquire into this matter, and should have inquired into it. If it came to the conclusion that when Mrs Jordan uttered the word "guilty" her mind was overborne by the will of another, then they could have so found and sent the case back to the magistrates.

But I must explain why. I am satisfied first of all that the Crown Court ought to have jurisdiction. It is a wholly absurd situation if it is a defence of a wife to prove that she committed the crime under coercion by her husband but she loses the right to put that defence forward or to rely on that defence if the coercion is of so grave a character that she is unable to put forward a plea of not guilty. That is not to say that the law is that. I am saying that the law ought to be that.

A similar case was considered by this court in *R. v. Crown Court at Snaresbrook, ex parte Gavi Burjore* (20th December 1979, (2)). The court was composed of Shaw, LJ, and Kilner Brown, J. That was a case in which duress was alleged and Kilner Brown, J, in giving the judgment, with which Shaw, LJ, agreed, stated:

"in the case of an appeal to the Crown Court against conviction before the magistrates which has proceeded to the passing of sentence, there is no power in the Crown Court to reopen the question of the validity of the plea of guilty. There are, however, certain exceptions to that general statement of principle: one is where it can be shown that the plea of guilty was entered under a mistake as to

the law and the other, which is relevant in the present case, is the possibility of the reconsideration of a plea of guilty if it can be shown that it was entered under duress. Authority for the latter proposition is to be found in *R. v. Inns* (3).

That passage has been criticised by counsel for the prosecution on a number of grounds. First it is said that there is no authority anywhere for the proposition that a plea of guilty entered under a mistake of law can be investigated by the Crown Court. For my part I would not wish to express any view about that, it seems to be a quite different case from one of duress. I would observe in passing that, as is clear from the passage that I have cited, this was obiter and not necessary for the decision of the court in that case. Somebody at some time may have to decide this matter. We do not in this case.

Then it is said that anyway this passage is itself obiter. There I part company with counsel for the prosecution, because, while it is true that what the Divisional Court was deciding in that case was whether the Crown Court should have extended the time for an application, if this court had come to the conclusion that an extension of time would have been completely idle because the court would have had no jurisdiction to deal with the substance of the application, it could not conceivably have acted as it did and ordered the Crown Court to extend the time. It was I think part of the ratio of that decision and we are bound by it. But I would go further than that and say that, speaking for myself, I think that decision was right, because where you have a plea of guilty given under duress (it may not be this case), it seems to me that you are either in a position that there is no plea at all, which is a possible view, or, alternatively, you are in the position of a 'guilty but' plea — 'the reason why I am pleading guilty is that I am being forced to do so' situation.

It is said by counsel for the prosecution that this cannot be regarded as a 'guilty but' plea because there are a number of cases notably *R. v. Marylebone Justices, ex parte Westminster City Council* (1) where it was said by Lord Parker CJ:

"The enquiry in each case is as to what took place before the magistrates' court to see whether the court acted properly in accepting an apparent plea of guilty as an unequivocal plea."

Quite plainly the magistrates acted properly in this case on what they knew. There was nothing they could have done but accept this plea. But I do not believe that those words would have been used by Lord Parker in the *Marylebone Justices* case if he had been considering a case such as this. He did not in fact say that the inquiry must be confined to what was 'apparently' happening in the magistrates' court. He said 'what took place'. It is the essence of duress that what is happening is not only what is apparent to anybody in the court but

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(1) 135 JP 239; [1971] 1 All E R 1025
(3) (1974) 60 Cr App R 231

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what is actually happening there, albeit in an unapparent or latent form.

Two situations were put in argument by Bingham J, with husband and wife as co-accused. In the first the husband lifts a revolver, puts it to his wife's head in the sight of all, and says: 'My dear, you plead guilty or else'. If she did plead guilty, that would undoubtedly be an equivocal plea. In the second the co-defendant keeps the revolver in his pocket and manipulates it so that she can feel it pressing against her, and she then, enters an apparently unequivocal plea of guilty. It would be a travesty of justice if the law treated these two cases differently. In my judgment it does not.

For these reasons I would remit the matter to the Crown Court with a direction that it has jurisdiction to investigate the case and that it should investigate the case. Nothing that I say must lead the Crown Court to think that I have formed any view whether Mrs Jordan's allegations are correct. Also, and this may be more important in the light of the submissions of counsel for the prosecution, I think that if this case is proved by Mrs Jordan on investigation, it is a case of the greatest rarity indeed, and it would be most unfortunate if every married woman thought that she could apply to the Crown Court with a view to having her plea of guilty treated as equivocal merely on an allegation that her husband was not as good a husband as he might have been. It is a matter which should be investigated by the Crown Court.

Let me add this. If, but only if, the Crown Court decides that this plea of guilty was produced by duress and that the matter should go back to the magistrates for rehearing, then the magistrates would be able to reconsider the mode of trial. Certainly they might well take the view that if this lady was acting under duress in pleading guilty, the same considerations may have applied to her consent to summary trial. At all events it seems unlikely that anyone who is sufficiently under the influence of her husband in pleading guilty could be making a free choice on whether she should be tried summarily or not. They may in those circumstances think it right to reconsider the aspect too.

We quash the decision of the Crown Court and order that a rehearing of the applicant takes place. We make no order against the magistrates.

BINGHAM J.: I agree. Counsel for the prosecution has referred to a number of clear statements of principle to the effect that pleas of guilty may only be reopened before sentence or if equivocal. It must be remembered, when considering these statements, that the court in none of the cases was dealing with a situation of coercion or duress such as is alleged in the case before us. The only clear case which such a situation has been said to have existed is *R. v. Crown Court at Snaresbrook, ex parte Gavi Burjore* (2), and an order was there made by the court that the matter should be inquired into by the Crown Court.

Accordingly in my judgment the statements of principle must be read subject to the important reservation that the judges in those cases did not have the present situation in mind, because it was not raised before them.

Solicitors: *Bowling & Co; D C Beal*, Huntingdon.

Reported by G.F.L. Bridgman, Esq., Barrister

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Bingham, J.

COURT OF APPEAL
(Griffiths, L.J., Lawson, J., and Balcombe, J.)
March 13, 1981

R. v. HOLT AND ANOTHER

Criminal Law – Theft – Evasion of liability by deception – Dishonestly inducing creditor to forgo payment of liability – attempt– Theft Act, 1978, s.1(1)(b).

The appellants were charged in the Crown Court with an attempt to commit an offence under s.2(1)(b) of the Theft Act, 1978, namely, that with intent to make permanent default on an existing liability they attempted to induce one P, a waitress, to forgo payment of £3.65 by a false representation. On the evening of December 9, 1979, the appellants, having consumed meals at a restaurant, attempted to evade payment of that sum by pretending that they had already paid £3.65 to another waitress. At the close of the case for the prosecution it was submitted on behalf of the appellants that in the circumstances of the case an attempt to commit an offence should have been charged under s.2(1)(a) of the Act and not under s.2(1)(b). The appellants were convicted. On appeal,

Held (dismissing the appeals): the elements of the offence defined by s.2(1)(b) were clearly, first, that the defendants must be proved to have had the intent to make permanent default on the whole or part of an existing liability, which element had no application to the offences defined in s.2(1)(a) or (c). Secondly, given such intent, he must use deception. Thirdly, his deception must be practised dishonestly to induce the creditor to forgo payment. It was clear on the evidence that the appellants' conduct constituted an attempt to evade liability by deception, and the jury, who were properly directed, clearly concluded that the appellants' conduct was motivated by the intent to make permanent default on their supper bill; all the elements needed to constitute an attempt to commit the offence defined in s.2(1) were present, and the appellants were rightly convicted as charged.

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Appeals by Victor Reginald Hold and Julian Dana Lee for leave to appeal against their convictions at Liverpool Crown Court of attempt to commit offences under s.2(1)(b) of the Theft Act, 1978, treated as final appeals.

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P.C. Reid for the appellants.

J. Leach for the Crown.

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Cur adv vult

13th March 1981. LAWSON J read the following judgment of the court: Victor Holt and Julian Dana Lee apply to the full court for leave to appeal against their convictions at the Crown Court, Liverpool, on 16th July 1980 of attempting, contrary to the common law, to evade liability by deception, that is to say, an attempt to commit an offence contrary to s.2(1) of the Theft Act, 1978. This court granted leave to appeal and treated the hearing of the application as the hearing of the appeal.

The charge on which they were convicted was as follows. The statement of the offence was attempted evasion of liability by deception, contrary to common law. The particulars of the offence were that the appellants, on 9th December 1979, by deception with intent to make permanent default of an existing liability, did attempt to induce Philip Parkinson, servant of Pizzaland Restaurants Ltd, to forgo payment of £3.65 by falsely representing that payment had been made by them to another servant of the said Pizzaland Restaurants Ltd. From the use of the expressions 'with intent to make permanent default' and 'to induce [the creditor's agent] to forgo payment', it is clear that the attempt charged was one to commit the offence defined by s.2(1)(b) of the 1978 Act.

The facts of the case were that in the evening of 9th December 1979, the appellants consumed meals costing £3.65 in the Pizzaland Restaurant in Southport. There was a police officer off duty also having a meal in the restaurant and he overheard the appellants planning to evade payment for their meals by the device of pretending that a waitress had removed a £5 note which they had placed on the table. When presented with their bill, the appellants advanced this deception and declined payment. The police officer concerned prevented them from leaving the restaurant and they were shortly afterwards arrested and charged.

At the close of the prosecution case in the Crown Court counsel, who has also conducted this appeal, made a submission which was overruled, the main point of which was that, assuming the facts as we have recounted them to be correct, the attempt to evade thus emerging was an attempt to commit an offence not under s.2(1)(b) as charged but under s.2(1)(a) of the 1978 Act since, he submitted, had the attempt succeeded, the appellants' liability to pay for their meals would have been 'remitted' and not just 'forgone', to use the contrasting terms contained in the respective subsections.

Counsel further developed his submission before us. As we understand it, he submits that the vital differences between the two offences defined in the first two paragraphs of s.2(1) of the Act are that 'remission' involves that, first, the creditor who 'remit' the debtor's existing liability must communicate his decision to the debtor, and, secondly, the legal consequence of the 'remission' is to extinguish the debt, whereas the 'forgoing of an existing liability', to use the words of subs.2(1)(b), need not be communicated to the debtor and has not the consequence in law of extinguishing such liability. We find great difficulty in introducing these concepts into the construction of the subsection. We will later return to the matter. Counsel further sub-

mitted that the effect of s.2(1) of the Act was to create three different offences but conceded that there could be situations in which the conduct of the debtor or his agent would fall under more than one of the three paragraphs of s.2(1).

The elements of the offence defined by s.2(1)(b) of the Act relevant to the present case are clearly these: first, the defendant must be proved to have the intent to make permanent default on the whole or part of an existing liability. This element is unique to s.2(1)(b); it has no application to the offences defined in s.2(1)(a) or (c). Secondly, given such intent, he must use deception. Thirdly, his deception must be practised dishonestly to induce the creditor to forgo payment.

It must always be remembered that in the present case, whatever offence was being attempted, the attempt failed. The creditor was not induced by the dishonest deception and did not forgo payment. It is clear on the evidence that the appellants' conduct constituted an attempt to evade liability by deception, and the jury, who were properly directed, clearly concluded that the appellants' conduct was motivated by the intent to make permanent default on their supper bill. Thus, all the elements needed to enable an attempt to commit the offence defined in s.2(1)(b) were found to be present, so that the appellants were rightly convicted as charged.

Reverting to the construction of s.2(1) of the Act, as to which the commentators are not at one, we are not sure whether the choice of expressions describing the consequences of deception employed in each of its paragraphs, namely in para. (a) 'secures the remission of any existing liability', in para. (b) 'induces a creditor to forgo payment', and in para. (c) 'obtains and exemption from liability', are simply different ways of describing the same end result or represent conceptual differences.

While it is plain that there are substantial differences in the elements of the three offences defined in s.2(1), they show these common features: first, the use of deception to a creditor in relation to a liability, secondly, dishonesty in the use of deception, and thirdly, the use of deception to gain some advantage in time or money. Thus the differences between the offences relate principally to the different situations in which the debtor-creditor relationship has arisen.

The practical difficulty which counsel's submissions for the appellants failed to confront is strikingly illustrated by cases of attempting to commit an offence under s.2(1)(a) or s.2(1)(b). If, as he submits, s.2(1)(a) requires communication of remission to the debtor, whereas s.2(1)(b) does not require communication of the 'forgoing of payment' but, as the case is a mere attempt, the matter does not end in remission of liability or forgoing of payment, then the prosecution would be in a dilemma since it would either be impossible to charge such an attempt or the prosecution would be obliged to charge attempts in the alternative in which case, since any attempt failed, it would be quite uncertain which of the alternatives it was. These appeals are dismissed.

Solicitors: *R.H. Nicholson, Liverpool.*

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Reported by G.F.L. Bridgman, Esq., Barrister.

R. v. Marcus
Court of Appeal

COURT OF APPEAL
(Shaw, L.J., Tudor Evans, J., and Sheldon, J.)
April 9, 1981

R. v. MARCUS

Criminal Law — Administering noxious thing with intent to injure, aggrieve or annoy — "Noxious" — Consideration not only of quality or nature of substance administered or sought to be administered, but also of quantity administered — Offences against the Person Act, 1861, s.24.

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The appellant, who was on bad terms with her neighbours, placed in bottles of milk left for them by the milkman chemical substances which were used in the preparation of sedative and sleeping tablets. When she was charged under s.24 of the Offences against the Person Act, 1961, with attempting to cause to be taken a noxious thing with intent to injure, aggrieve or annoy it was contended by the prosecution that while little harm would arise from the toxicity of the drugs in themselves there would be danger if they were taken by someone carrying out potentially hazardous operations, e.g. driving a car. Their effect would depend on the amount administered. The appellant was convicted of an offence under s.24 of the Act of 1861 and she appealed to the Court of Appeal.

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Held: the concept of a noxious thing involved consideration not only of the quality or nature of the substance administered but also of the quantity administered or sought to be administered; "noxious" did not mean harmful in the sense of injury to bodily health, but rather something different in quality from and of less importance than poison or other destructive things; the judge when summing-up to the jury directed them that it was a matter of fact and degree for them to decide whether the drugs put into the milk were noxious; that direction was unexceptionable, and the appeal would be dismissed.

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Appeal by Lily Marcus against her conviction at the Central Criminal Court of attempting to cause to be taken a noxious thing with intent to injure, aggrieve or annoy, contrary to s.24 of the Offences against the Person Act, 1961.

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H. Torrance for the appellant.
A. French for the Crown.

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Tudor Evans, J.

Cur adv vult

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9th April, 1981. TUDOR EVANS J read the following judgment of the court: This is an appeal against conviction on a point of law. On 13th December, 1979, the appellant was convicted at the Central Criminal Court of an attempt to cause to be taken a noxious thing with intent to injure, aggrieve or annoy contrary to s.24 of the Offences against the Person Act, 1961. On 7th February, 1980, the appellant was made subject to an order to enter into her own recognisance in the sum of £300 to come up for judgment if called on within three years. She was also ordered to pay £150 towards the legal aid costs of her defence.

The appellant lived very close to a family named Laskey. There had been trouble between them for a number of years. For some days before 15th May, 1978, the Laskey family had noticed that there was something wrong with the milk that was being delivered to their house. At first they blamed the dairy, but eventually they became suspicious and informed the police. On 12th May one of the milk bottles was handed in for analysis. On the morning of 15th May a police officer started to keep watch. He first saw the appellant with some children in the yard area between her house and the Laskeys' house. At 8.40 a.m. a milkman delivered two bottles of red top milk at the Laskeys' back door leaving them in a basket. By that time the Laskeys had left home for the day. The police officer, who was concealed in a ground floor room, then saw the appellant hurry over to the Laskeys' back door and remove the two bottles of milk. She took them into her own house. Very shortly afterwards she was seen to emerge from her own house carrying two bottles of red top milk. She replaced them in the basket at the Laskeys' back door. The red top on one of the bottles was found to be intact. The top of the other bottle was slightly loose.

A toxicologist, Mr. Wilson, was called to give evidence on behalf of the Crown. He analysed the contents of the bottle which the Laskeys had handed in on 12th May, as well as the bottle which had been found to have a slightly loose top. The bottle handed in on 12th May gave a positive test for some type of household detergent. Mr. Wilson was of the opinion that the detergent present could not be harmful. The incident of 12th May did not form part of the indictment. However, Mr. Wilson found that the contents of the other bottle were contaminated by two powdered substances which he identified as natrazepam and dichloralphenazone. These chemical substances were used in the preparation of well-known types of sedative and sleeping tablets. The former was sold only under the trade name Mogadon. The latter was used in sleeping tablets sold under a number of trade names but most commonly under the name Welldorm. Mr. Wilson found that the powdered drugs were impacted up to a level of half an inch from the bottom of the bottle. He also found, in the contents of the bottle, a trace of a well-known pain killer called paracetamol. The presence of paracetamol in the milk could have been explained if the person who had put the sleeping tablets into the milk had just been handling a drug containing paracetamol.

Mr. Wilson and Mr. Tozeland, a toxicologist called for the defence, were agreed that there were three to four doses of each of the sleeping tablets in the bottle. Mr. Tozeland thought that at least eight tablets had been put into it. They were also agreed that the dose of the drugs would be likely to cause sedation and even sleep. The speed at which the drugs would operate would depend on the amount taken and on the contents of the stomach at the time. The greater the amount of food in the stomach, the longer it would take for the drugs to have effect; if taken on an empty stomach, the effect would be more immediate and deeper. Mr. Wilson said in evidence that in his opinion little harm would arise from the toxicity of the drugs themselves but that there was a danger to someone carrying out potentially hazardous operations, for example, driving a car. He said that he would never

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describe a drug as harmless since the object of a drug is to affect the physiology of the person who takes it. Although this may operate in an appropriate case beneficially, there may be concurrent adverse side effects. Mr. Tozeland substantially agreed with him.

According to the appellant, on the morning of 15th May she had seen two bottles of red top milk on her draining board. She was unable to remember if she had brought the bottles into her house. At some stage, because she had had a bad night, she had in her hands a couple of tablets known as Solpadeine. These were pain-killing tablets containing paracetamol, a trace of which was subsequently found in the bottle containing the sleeping tablets. The appellant said that she had pushed the top of one of the bottles down but then, because of the colour of the top, she realised that the milk was not hers and she then put them outside the Laskeys' back door.

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There was evidence before the jury that the appellant had previously taken sleeping tablets, (including Mogadon but not Welldorm) but that she did not have sleeping tablets at the time of the alleged offence. When interviewed by the police, the appellant denied putting anything into the milk but later she said that she had been upset and annoyed by the Laskeys and had put two Solpadeine tablets into their milk.

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There was ample evidence before the jury on which they could find that the appellant had put at least eight tablets into the milk bottle and that, when she did so, she intended to injure, aggrieve or annoy the Laskeys. But counsel for the appellant contends that an offence was not committed because the tablets were not a 'noxious thing' within s.24 of the Act.

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Two submissions are made. First, it is said that for a thing to be noxious within the meaning of s.24, it must be noxious in itself. A thing which is intrinsically harmless cannot become noxious or harmful because it is given in excess quantity. In support of this submission, counsel relied on obiter dicta of Lord Widgery CJ in *R. v. Cato* (1). Secondly, it is submitted that the word 'noxious' means harmful and that the meaning is necessarily confined to injury to bodily health. The word cannot mean harm involving an impairment of faculties. Counsel submits that on the undisputed evidence there was in fact no risk of injury to bodily health. If any one member of the Laskey family had drunk the milk, or any part of it, he or she would have been sedated or at most would have been caused to fall asleep.

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In *R. v. Cato* (1) the appellant had been convicted of manslaughter and of an offence under s.23 of the Offences against the Person Act 1861 by the administration of heroin. Section 23 is in language similar to s.24, but concerns the endangering of life or the causing of grievous bodily harm. Lord Widgery CJ observed, speaking of s.23:

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'The thing must be a "noxious thing" and it must be administered "maliciously". What is a noxious thing, and in particular is heroin a noxious thing? The authorities show that an article is not to be described as noxious for present purposes merely because it has a

potentiality for harm if taken in overdose. There are many articles of value in common use which may be harmful in overdose, and it is clear on the authorities when looking at them that one cannot describe an article as noxious merely because it has that aptitude. On the other hand, if an article is liable to injure in common use, not when an overdose in the sense of an accidental excess is used, but is liable to cause injury in common use, should it then not be regarded as a noxious thing for present purposes?

It was then held that heroin was a noxious thing for the purposes of s.23.

Counsel for the appellant, relying on those observations, submits that the sleeping tablets, being harmless in themselves, could not be regarded as noxious within s.24 simply because the appellant had attempted to administer or cause to be administered an excess quantity of them. The question whether a thing could be noxious within the 1861 Act if administered in excessive quantity was considered in a number of authorities in the last century. It was held in cases to which we shall refer that, although a substance may be harmless if administered in small quantities, it may nevertheless be noxious if administered in excessive quantities.

In *R. v. Hennah* (2) the defendant was charged with administering cantharides contrary to s.24 of the 1861 Act. In his judgment, Cockburn CJ clearly envisaged that although a substance may be harmless in small quantities, it may be noxious within the section if a sufficient quantity is administered. He is reported as saying (at 549):

'Upon the medical evidence before us, cantharides, or, as it is commonly called, spanish fly, is administered medicinally and in small quantities, and up to a certain extent is incapable of producing any effect. What is important to the present case is that the quantity administered was incapable of producing any effect. The statute makes it an offence to administer, although not with the intention of taking life or doing any serious bodily harm, any noxious thing with intent to cause injury or annoyance. But unless the thing is a noxious thing in the quantity administered, it seems exceedingly difficult to say logically there has been a noxious thing administered. The thing is not noxious in the form in which it has been taken; it is not noxious in the degree or quantity in which it has been given and taken. We think, therefore, the indictment will not hold. It would be very different if the thing administered, as regards either its character or degree, were capable of doing mischief.'

In *R. v. Cramp* (3) the appellant was convicted of an offence under s.58 of the 1861 Act which, inter alia, makes it an offence to procure or attempt to procure an abortion by administering or causing to be

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(2) (1877) 13 Cox CC 547

(3) (1880) 44 JP 411; 5 QBD 307

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administered any poison or other noxious thing. The poison or noxious thing administered was a half ounce of juniper. It was submitted on behalf of the defendant, as it is in this case, that the offence consists of administering a thing in itself noxious and that the statute does not make it an offence to administer harmless substances even in excessive doses. The submission was unanimously rejected by a court of five judges. We need refer only to two passages. Lord Coleridge CJ said:

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'The intent with which the oil of juniper was given was proved, and it was further proved that it was noxious in the quantity administered. What is a poison? That which when administered is injurious to health or life, such is the definition of the word poison. Some things administered in small quantities are useful, which, when administered in large quantities, are noxious.'

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Denman J said:

'Where a person administered with the improper and forbidden intent large quantities of a thing which so administered is noxious, though when administered in small quantities it is innocuous, the case falls within the statute.'

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We are of the opinion that for the purposes of s.24 the concept of 'noxious thing' involves not only the quality or nature of the substance but also the quantity administered or sought to be administered. If the contention of the appellant is correct, then, on the assumption that the drugs were intrinsically harmless, it would follow that if the appellant had attempted to administer a dose of 50 tablets by way of the milk, an amount which, if taken, would have been potentially lethal, she would have committed no offence. We do not consider that such a result can follow from the language of s.24. The offence created by the section involves an intention to injure, aggrieve or annoy.

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We consider that the words 'a noxious thing' mean that the jury has to consider the very thing which on the facts is administered or sought to be administered both as to quality and as to quantity. The jury has to consider the evidence of what was administered or attempted to be administered both in quality and in quantity and to decide as a question of fact and degree in all the circumstances whether that thing was noxious. A substance which may have been harmless in small quantities may yet be noxious in the quantity administered. Many illustrations were put in the course of the argument; for example, to lace a glass of milk with a quantity of alcohol might not amount to administering a noxious thing to an adult but it might do so if given to a child.

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We do not consider that Lord Widgery in *R. v. Cato* (1) was intending to lay down the general proposition that a substance harmless in itself and in small quantities could never be noxious within s.24 of the 1861

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Act if administered in large quantities. *R. v. Cato* (1) was a very different case from the present. The court was concerned with heroin, plainly a dangerous substance. *R. v. Cramp* (3) was not cited to the court.

We shall now consider the second submission for the appellant that the word 'noxious' means harmful in the sense of injury to bodily health. Counsel took us through the relevant sections of the 1861 Act. In a number of sections (including s.24) the words 'poison or other destructive or noxious thing' appear. It was submitted that the meaning of the word 'noxious' must take colour from the preceding words. We do not accept that construction. It seems to us, looking at the relevant sections, that the statute is dealing with offences in a declining order of gravity and that by 'noxious' is meant something different in quality from and of less importance than poison or other destructive things.

On this part of this argument counsel relies on evidence from the toxicologists on both sides that the dose would do no more harm than to cause sedation or possibly sleep and was therefore harmless. In fact, the evidence was not so confined. In the course of his summing-up the judge, having referred to the evidence relating to sedation and sleep, continued:

'Mr Wilson said that little harm is likely to arise, in his opinion, from the toxicity of the drugs themselves, but there is a danger to someone carrying out normal but potentially hazardous operations, for example, driving while their faculties are impaired. You may think that it would not have to be driving, it might be crossing a London street, for example; one could think of a lot of things.'

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There was therefore evidence before the jury that the drugs in the quantity in which they were present in the milk were potentially harmful in the sense of being capable of causing injury to bodily health. The result of the evidence was that the milk might have had a direct physical effect on the victim. But we do not consider that the word 'noxious' bears the restricted meaning for which counsel contends.

In the course of his summing-up the judge quoted the definition of 'noxious' from the Shorter Oxford English Dictionary, where it is described as meaning 'injurious, hurtful, harmful, unwholesome'. The meaning is clearly very wide. It seems to us that even taking its weakest meaning, if for example a person were to put an obnoxious (that is objectionable) or unwholesome thing into an article of food or drink with the intent to annoy any person who might consume it, an offence would be committed. A number of illustrations were put in argument, including the snail said to have been in the ginger beer bottle (to adapt the facts in *Donoghue v. Stevenson*) (4). If that had been done with any of the intents in the section, it seems to us that an offence would have been committed.

(1) 140 JP 169; [1976] 1 All ER 260

(3) (1880) 44 JP 411; 5 QBD 307

(4) [1932] AC 562

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The judge when summing-up to the jury reminded them fully of the evidence and directed them that it was matter of fact and degree for them to decide whether the drugs in the milk were noxious. His direction in law was unexceptionable. The appeal must be dismissed.

Solicitors: *R E T Birch.*

Reported by G.F.L. Bridgman, Esq., Barrister.

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HOUSE OF LORDS
(Lord Diplock, Lord Fraser of Tullybelton, Lord Russell of Killowen,
Lord Keith of Kinkel, and Lord Roskill)
July 2, 1981

PASCOE v. NICHOLSON

Road Traffic — Driving with blood-alcohol concentration above prescribed limit — Need for provision of a specimen of breath for a breath test at a police station and the provision of a sample of blood or urine all to take place at the same police station — Road Traffic Act, 1972, s.6(1).

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At 12.55 a.m. on June 10, 1979, police officers stopped the respondent, David Ralph Nicholson who was riding a motor cycle on a road because they suspected that he had an excess of alcohol in his body. He was required to supply a specimen of breath which proved to be positive. He was arrested and taken to P police station where he provided a second specimen of breath which also was positive. He was then required to provide a specimen of blood or urine for a laboratory test, to which he agreed. He was taken to the C police station where a specimen of blood was taken from him by a doctor which, when tested, was found to contain more than twice the permitted quantity of alcohol. An information was preferred against the respondent for an offence under s.6(1) of the Road Traffic Act, 1972, which was heard by the P justices. At the close of the case for the prosecution it was submitted on behalf of the respondent that there was no case for him to answer because the evidence of the result of the analysis of the specimen of blood was inadmissible on the ground that the provision of a specimen of breath for a breath test at a police station, the request for a sample of blood or of urine, and the giving of such sample must all take place at the same police station. The justices upheld the submission and dismissed the summons. An appeal by the prosecution was dismissed by a Divisional Court. On a further appeal by the prosecution to the House of Lords.

Held: the provisions of the Road Traffic Act, 1972, and in particular ss. 6 to 12 thereof, did not require that the provision of a specimen of breath for a breath test at a police station, the request for a sample of blood or urine, and the giving of such sample, must all take place at the same police station; the appeal would be allowed.

Appeal by Chief Inspector Peter Pascoe, of Penzance, against a decision of a Divisional Court of the Queen's Bench Division.

M Hutchison QC and C Ackner for the appellant.
J H Inskip QC and C Jervis for the respondent.

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Their Lordships took time for consideration.

2nd July, 1981. The following opinions were delivered.

Lord Diplock

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LORD DIPLOCK: My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Roskill, with which I am in full agreement.

Lord Fraser of Tullybelton

LORD FRASER OF TULLYBELTON: I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Roskill. I agree with it and for the reasons stated in it I would allow this appeal and dispose of the case as he proposes.

Lord Russell of Killowen

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LORD RUSSELL OF KILLOWEN: I have had the advantage of reading in draft the speech about to be delivered by my noble and learned friend Lord Roskill. I agree with it and with the adoption of the course that he proposes.

Lord Keith of Kinkel

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LORD KEITH OF KINKEL: I have had the benefit of reading in draft the speech of my noble and learned friend Lord Roskill. I agree with it, and would accordingly allow the appeal and answer the certified question as he proposes.

Lord Roskill

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LORD ROSKILL. My Lords, all the events giving rise to this appeal, except the last, took place within less than two hours early on the morning of 30th June, 1979. At 12.55 a.m. that morning two police officers suspected that the respondent was driving his motor cycle with an excess of alcohol in his body. Their suspicions were aroused by the manner of his driving near Marazion in Cornwall. They stopped him. They smelt alcohol on his breath. At 1 a.m. one of the officers required the respondent to provide a specimen of breath. At 1.10 a.m. this specimen was provided. It was positive. The respondent was arrested and taken to Penzance Police Station. There, at 1.33 a.m., he provided a second specimen of breath. It, too, was positive. At 1.37 a.m., at Penzance Police Station, the respondent was required to provide a specimen for a laboratory test and, pursuant to s.9(7) of the Road Traffic Act, 1972, was warned of the consequences of any failure to provide a specimen of blood or of urine. At 1.39 a.m. a police officer requested the respondent to supply a sample of blood. The respondent then agreed to do so. The respondent was thereupon taken from Penzance Police Station to Camborne. A specimen of blood was there taken from him by a doctor. On laboratory testing (the admissibility of the result of which was in issue) that specimen was found to contain not less than 164 mg of alcohol in 100 ml of blood, more than twice the permitted quantity. On 9th August, 1979, an information was preferred by the appellant against the respondent for an offence contrary to s.6(1) of the 1972 Act. That information was

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heard by the Penzance justices on 5th and 19th November, 1979. At the close of the case for the prosecution it was submitted on behalf of the respondent that there was no case to answer because the evidence of the result of the analysis of the specimen of blood, to which I have already referred, was inadmissible. The appellant conceded that, if that evidence were inadmissible, there was no case to answer. The justices upheld the submission and dismissed the information. They stated a Case for the opinion of the High Court, asking the following question:

"Whether the provisions of the Road Traffic Act, 1972, and in particular ss.6 to 12 thereof, require that the provision of a specimen of blood or urine, and the giving of such a sample, must all take place at the same police station."

This submission for the respondent was founded on a decision of the Divisional Court (Lord Parker, LJ, Ashworth and Cantley, JJ) in *Butler v Easton* (1), decided on 22nd October, 1969. The attention of the justices was, however, properly drawn to a later decision of the High Court of Justiciary, *Milne v M'Donald* (2), decided on 27th May, 1971, in which the court (the Lord Justice-General (Clyde), Lords Migdale and Johnston) in a reserved judgment followed an earlier unreported decision of their own (*Galloway v Cruickshank*, (3)) and reached the opposite conclusion to that which had been reached by the Divisional Court, and expressly declined to follow that earlier decision. The difference of opinion arose on a single issue, namely, whether on the true construction of s.3(1) of the Road Safety Act, 1967, which was the statutory predecessor of s.9(1) of the 1972 Act, it was essential for the provision of the specimen of blood or of urine to take place at the same police station as that at which the requirement to provide that specimen had been made. The Divisional Court had held that it was essential for that requirement to provide the specimen and its actual provision to take place at the same police station. The High Court of Justiciary held that it was not. The justices sitting at Penzance in the present case rightly held that they were bound to follow the decision of the Divisional Court, though they were referred to and recognised the persuasive authority of the decision of the High Court of Justiciary. It was for this reason that they held that the evidence of the result of the analysis of the specimen of blood taken from the respondent at Cambourne Police Station was inadmissible. They accordingly, and rightly on this view of the law, dismissed the summons.

When the present appeal by the appellant came before the Divisional Court by way of Case Stated on 30th October, 1980, that court was also bound by its earlier decision. Indeed, the proceedings of the

(1) [1970] RTR 109

(2) 1971 SC LT 291

(3) Unreported. High Court of Justiciary

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Maidstone Borough Council v. Mortimer

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R. v. Croydon Justices. Ex parte Lefore Holdings Ltd

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R. v. Tiverton Justices. Ex parte Smith

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MAGISTRATES – Fine – Commitment – Defaulter serving term of imprisonment – Need for notice to defaulter – Criminal Justice Act, 1967, s.44(6).

Forrest v. Brighton Justices. Hamilton v. Marylebone Magistrates' Court

HL 356

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R. v. Birmingham Justices. Ex parte D.W. Parkin Construction Ltd

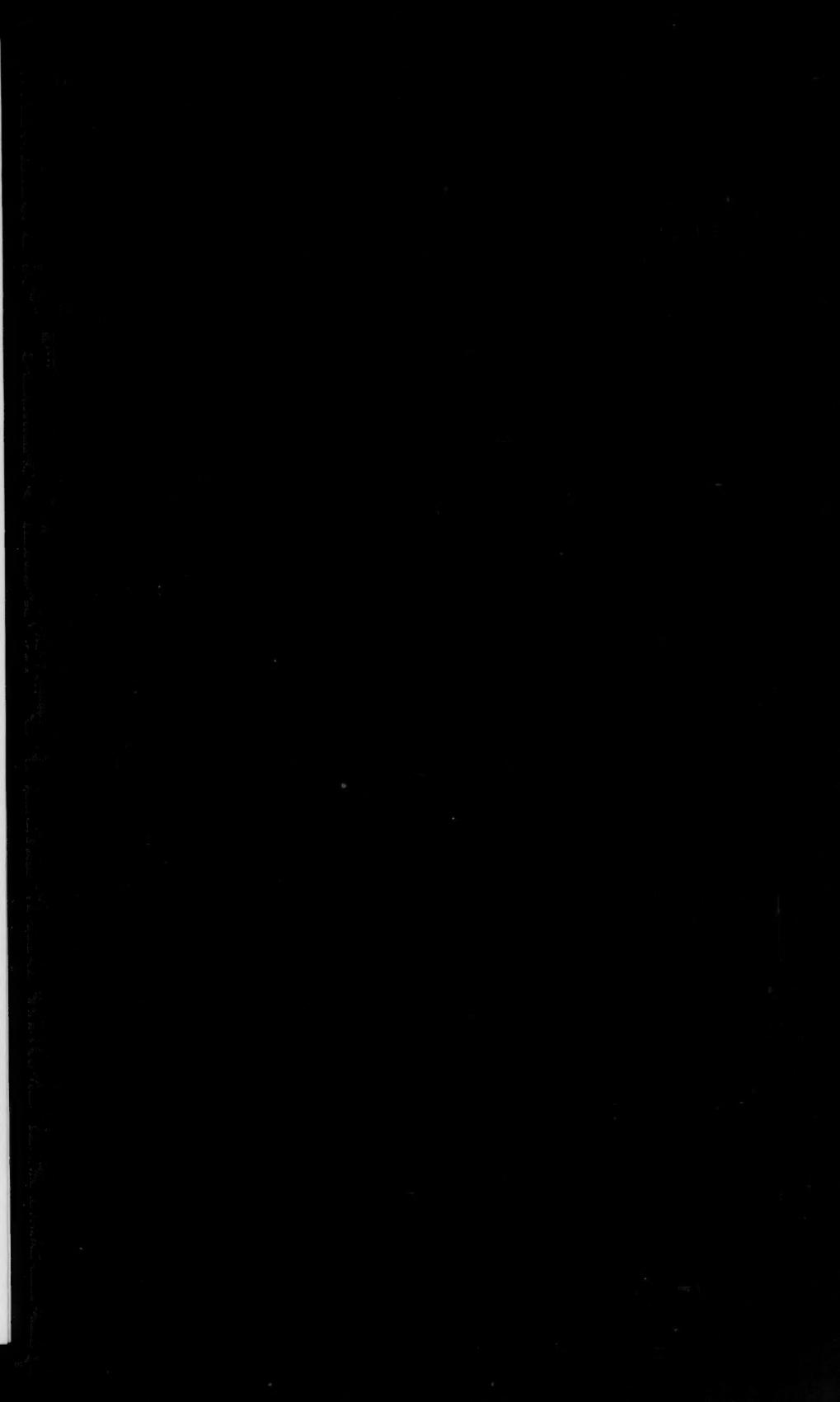
R. v. Gateshead Justices. Ex parte Tesco Stores Ltd

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MAGISTRATES – Juvenile court – Defendant aged 16 when charged and pleading – Defendant becoming 17 before date of hearing of case – Children and Young Persons Act, 1969, s.6 – Criminal Law Act, 1977, s.19(1).

R. v. St. Albans Juvenile Court. Ex parte Godman

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Divisional Court are recorded to have lasted only five minutes. But the Divisional Court certified the following question as raising a point of law of general public importance, namely:

"Whether the provisions of the Road Traffic Act, 1972, and in particular ss. 6 to 12 thereof require that the provision of a specimen of breath test at a police station, the request for a sample of blood or of urine, and the giving of such sample of blood or urine, must all take place at the same police station"

thus inviting your Lordships to answer the same question as that which the justices had asked in their Case Stated.

The Divisional Court refused leave to appeal but that leave was granted by your Lordships' House on 18th December, 1980.

My Lords, thus after an interval of some ten years, your Lordships' House is invited, for the first time, to decide which of the two decisions to which I have already referred is right. Those two decisions are in principle indistinguishable and, indeed, the present case is, on its facts, also in principle indistinguishable from those earlier cases.

My Lords, as I have already said, the determination of this appeal depends on the true construction of s.9(1) of the 1972 Act. But since both learned counsel invited attention to, and indeed sought support for their respective submissions from, other sections of the statute, I set out for ease of reference those parts of the several sections on which reliance was thus placed:

"8.—(1) A constable in uniform may require any person driving or attempting to drive a motor vehicle on a road or other public place to provide a specimen of breath for a breath test there or nearby, if the constable has reasonable cause — (a) to suspect him of having alcohol in his body, or (b) to suspect him of having committed a traffic offence while the vehicle was in motion; but no requirement may be made by virtue of para. (b) above unless it is made as soon as reasonably practicable after the commission of the traffic offence. (2) If an accident occurs owing to the presence of a motor vehicle on a road or other public place, a constable in uniform may require any person who he has reasonable cause to believe was driving or attempting to drive the vehicle at the time of the accident to provide a specimen of breath for a breath test — (a) except while that person is at a hospital as a patient, either at or near the place where the requirement is made or, if the constable thinks fit, at a police station specified by the constable; (b) in the said excepted case, at the hospital; but a person shall not be required to provide such a specimen while at a hospital as a patient if the medical practitioner in immediate charge of his case is not first notified of the proposal to make the requirement or objects to the provision of a specimen on the ground that its provision or the requirement to provide it would be prejudicial to the proper care or treatment of the patient. (3) A person who, without reasonable excuse, fails to provide a specimen of breath for a breath test under subs. (1) or (2) above shall be guilty of an offence . . . (7) A person

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arrested under this section, or under the said s.5(5), shall, while at a police station, be given an opportunity to provide a specimen of breath for a breath test there . . .

9.—(1) A person who has been arrested under s.5(5) or 8 of this Act may, while at a police station, be required by a constable to provide a specimen for a laboratory test (which may be a specimen of blood or of urine), if he has previously been given an opportunity to provide a specimen of breath for a breath test at that station under subs.(7) of the said s.8, and either — (a) it appears to a constable in consequence of the breath test that the device by means of which the test is carried out indicates that the proportion of alcohol in his blood exceeds the prescribed limit, or (b) when given the opportunity to provide that specimen, he fails to do so. (2) A person while at a hospital as a patient may be required by a constable to provide at the hospital a specimen for a laboratory test — (a) if it appears to a constable in consequence of a breath test carried out on that person under s.8(2) of this Act that the device by means of which the test is carried out indicates that the proportion of alcohol in his blood exceeds the prescribed limit, or (b) if that person has been required, whether at the hospital or elsewhere, to provide a specimen of breath for a breath test, but fails to do so and a constable has reasonable cause to suspect him of having alcohol in his body; but a person shall not be required to provide a specimen for a laboratory test under this subsection if the medical practitioner in immediate charge of his case is not first notified of the proposal to make the requirement or objects to the provision of a specimen on the ground that its provision, the requirement to provide it or a warning under subs.(7) below would be prejudicial to the proper care or treatment of the patient. (3) A person who, without reasonable excuse, fails to provide a specimen for a laboratory test in pursuance of a requirement imposed under this section shall be guilty of an offence . . . (5) A person shall not be treated for the purposes of subs.(3) above as failing to provide a specimen unless — (a) he is first requested to provide two specimens of urine within one hour of the request, but fails to provide them within the hour or refuses at any time within the hour to provide them; and (c) he is again requested to provide a specimen of blood, but refuses to do so . . . (7) A constable shall on requiring any person under this section to provide a specimen for a laboratory test warn him that failure to provide a specimen of blood or urine may make him liable to imprisonment, a fine and disqualification, and, if the constable fails to do so, the court before which that person is charged with an offence under s.6 of this Act or this section may direct an acquittal or dismiss the charge, as the case may require. In this subsection 'disqualification' means disqualification for holding or obtaining a licence to drive a motor vehicle granted under Part III of this Act . . .

"II. Any person required to provide a specimen for a laboratory test under s.9(1) of this Act may thereafter be detained at the police station until he provides a specimen of breath for a breath test and it appears to a constable that the device by means of which the test is carried out indicates that the proportion of alcohol in that per-

son's blood does not exceed the prescribed limit."

My Lords, it was urged for the appellant that nowhere in s.9(1) was there any express limitation on the place where the specimen for a laboratory test was to be provided. The subsection properly interpreted contrasted the requirement to provide such a specimen with its actual provision. The requirement to provide had to be made at the same police station as that where the opportunity to supply the specimen of breath for the second breath test had been given pursuant to s.8(7). Only those two events had to take place at the same police station, but not the third event referred to in s.9(1), namely the actual provision of the specimen for the laboratory test.

Your Lordships' attention was drawn to the provisions of s.8(1) and (2) and of s.9(2) as showing that where the statute intended to limit or define the place at which a particular event, or events, was or were to take place, it so provided in specific terms. Thus the breath test provided for in s.8(1) had to take place 'there or nearby', that is to say, there or nearby on the road or other public place referred to earlier in that subsection. A similar provision, subject to the stated exception, is included in s.8(2) in the case of an accident. Moreover, s.9(2) opens with the words 'A person while at a hospital . . .' may be requested in certain circumstances to provide 'at the hospital' a specimen for a laboratory test, words of limitation or restriction as to the place where the requirement can be made and the specimen provided which are not to be found in s.9(1). Attention was also drawn to the provisions in s.9(7) regarding warning and to the absence of any words of limitation or restriction in that subsection as to where the warning should be given.

These were in substance the submissions which found favour with the High Court of Justiciary. But that court did not in its judgment refer to s.11 (formerly s.4 of the 1967 Act) which provides for detention 'at the police station' (I italicise the definite article) after the specimen for the laboratory test has been provided, in effect, until the motorist is fit to drive. It was this section which had impressed the Divisional Court, and led that court to its conclusion. Lord Parker, CJ, said:

'That . . . clearly shows that it is contemplated that he shall be kept throughout at one and only one police station.'

I find it difficult to believe that the High Court of Justiciary overlooked this section, for they clearly considered, but disagreed with, the decision of the Divisional Court which was based on its provisions. I think the High Court of Justiciary must have thought that the statutory predecessor of s.11 was not, of itself, enough to lead to a different conclusion from that to which the other relevant sections of the 1967 Act pointed.

Learned counsel for the respondent in his argument founded much on s.11. He argued that the provisions of this part of the statute, while restricting the liberty of the individual, were designed to see that those liberties were not unduly restricted. He urged that the argument for the appellant had precisely the result of imposing undue restriction

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on those liberties. If a motorist was taken to a police station after the first breath test was positive and then, after any second breath test, he was required to provide a specimen for a laboratory test, and to that end might be taken many miles to another police station for the provision of that specimen, and there detained until fit to drive, the motorist would be likely when fit to have to go back to the first police station to regain possession of his car in order to go home. It was urged that the appellant's argument ignored the use of the definite article in s.11. If those submissions were sound, it was said that the indefinite article could equally well have been used, as it was used in s.9(1).

As my noble and learned friend Lord Keith pointed out during the argument, if on arrival at a police station the motorist sought a second breath test and there was then no suitable breathalyser available at that police station, there is nothing in the statute which would prevent the police at that juncture taking the motorist to another police station where proper equipment was available. If that be permissible, as, like my noble learned friend, I think it clearly would be, I see no logical reason why in the absence of express statutory provision, the motorist should not, after being required to supply the specimen for a laboratory test immediately following a second breath test, be taken to another police station where a doctor is more easily available in order to take from him the specimen of blood. It is not difficult to visualise many parts of the United Kingdom where it might be extremely difficult to obtain the services of a doctor at some isolated police station.

Learned counsel for the respondent also founded an elaborate argument on s.9(5). Suppose, he contended, that the motorist first volunteered to provide a specimen of blood and to that end was taken to a second police station and then was unable, or unwilling, perhaps for some understandable reason to provide that specimen, and sought to fall back on his alternative option to provide a specimen of urine. The motorist might then have to be taken back to the first police station. This argument, if I understood it correctly, is based on a misunderstanding of s.9(5), which is concerned with and only with the offence created by s.9(3). A motorist must, before being liable to conviction for an offence against the subsection, namely, of failing to provide a specimen for a laboratory test, be shown to have been given but to have failed to have availed himself of the successive opportunities required by s.9(5) to have been accorded to him. The subsection is, to my mind, irrelevant in the present case and sheds no light on the true construction of s.9(1).

Apart from the provisions of s.11, I would have no doubt that the language of s.9(1), read in isolation and without regard even to s.9(2), imposes no restriction which makes it essential that the specimen for the laboratory test must be provided at the same police station as that at which the requirement that it be provided is made. But I think this conclusion is strongly reinforced by the provisions of s.9(2) and also of s.9(7) regarding the insistence on warning. With profound respect to Lord Parker CJ, I do not regard the language of s.11 as strong enough to require a contrary conclusion, for in the context I think '*the police station*' in that section can be legitimately construed as meaning '*the police station where he is*'. It follows that, in my view,

Butler v Easton (1) was wrongly decided and the decision of the High Court of Justiciary in *Milne v M'Donald* (2) is to be preferred. I would, therefore, allow the appeal and answer the certified question in the negative.

My Lords, the question also arose whether your Lordships' House should remit this case to the justices with a direction to continue the hearing, for, as I have already said, the respondent succeeded on a submission, now held to be wrong but correct when made, of no case to answer. Learned counsel for the respondent told your Lordships that it had been proposed to raise by way of substantive defence an issue whether or not the respondent had been properly told of the reason for his arrest. Learned counsel for the appellant did not ask your Lordships to remit the case, being content to succeed in the appeal solely on the question of law raised. In view of this generous attitude by the prosecution, I think it might leave a sense of injustice in the respondent were he now, some two years after the events in question, be put in peril afresh of losing his licence as well as of some financial penalty. Your Lordships were told that he is a man with no previous convictions. If your Lordships agree, I would propose that exceptionally, and possibly fortunately for the respondent, your Lordships' House should only allow the appeal and answer the certified question in the negative, for this appeal was brought to clarify the law rather than to punish the respondent.

Solicitors: *Robbins, Olyvey & Lake*, for *Cornish & Birtill*, Penzance; *Burton, Yeates & Hart*, for *Vivian Thomas & Jervis*, Penzance.

Reported by G.F.L. Bridgman, Esq., Barrister

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- (1) [1970] RTR 109
(2) 1971 Sc L T 291

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COURT OF APPEAL
(Ackner, L.J., Tudor Evans, J., and Drake, J.)
April 2, 1981

ATTORNEY-GENERAL'S REFERENCE (No. 4 of 1980)

Criminal Law — Manslaughter — Proof — Death due to one or other of two or more different acts each of which would be sufficient to establish manslaughter — Need to prove, in order to found a conviction, which act caused death.

i

The accused was charged with the manslaughter of a woman with whom he had been living. In the last of a series of statements which he made to the police he said that he and the deceased had an argument while on a landing in the house in which they lived in the course of which each slapped the other, he shook her hard, she dug her nails into him, and he pushed her away causing her to fall backwards over the handrail of the stairs, and down the stairs head first onto the floor. He went downstairs to find her with no sign of life. He dragged her upstairs by a rope tied round her neck, placed her in the bath, and cut her neck with a knife to let out her blood, he having decided to cut up her body and dispose of the pieces. At the close of the case for the Crown, counsel for the defence submitted that there was no case to go to the jury as they could not be sure what caused the woman's death, whether it was her fall down the stairs or what the accused did afterwards. The judge withdrew the case from the jury and directed an acquittal on the ground that the prosecution had failed to prove the cause of the death of the deceased.

ii

Held: if an accused person was proved to have killed another by one or other of two or more different acts each of which was sufficient to establish manslaughter it was not necessary in order to found a conviction to prove which act caused the death.

iii

Reference by Attorney-General under s.36 of the Criminal Justice Act, 1972.

iv

B. Walsh Q.C. and K. Lawrence for the Attorney-General.
J. Chadwin Q.C. and A. Khan for the respondent.
the respondent.

Ackner, J.

v

April 2, ACKNER LJ: read the following judgment of the court: This is a reference to the court by the Attorney-General of a point of law seeking the opinion of the court pursuant to s. 36 of the Criminal Justice Act 1972. It raises yet again the problem of the supposed corpse, and the facts, which I take from the terms of the reference itself, are inevitably macabre.

vi

The deceased was the fiancee of the accused and for some months before her death they had lived together in a maisonette consisting of two floors of a house connected by two short flights of carpeted wooden stairs. The deceased was employed locally and was last seen at work on January 17, 1979 at about 5 p.m. Thereafter no one, other than the accused, ever saw her alive again.

The deceased met her death on January 18, 1979, although this fact was not known until over three weeks later when the defendant so in-

formed a friend. His account, the first of a number, was that in the course of an argument on the evening of January 17 he had slapped her on the face causing her to fall downstairs and bang her head. He said that he had then put her to bed but discovered next morning that she was dead. He then took her body to his home town and buried her.

On the following day, February 14, he gave his second account, telling the same friend that after the deceased had 'fallen downstairs' he had dragged her upstairs by a piece of rope tied round her neck. He subsequently cut up her body with a saw before burying it. The next day, on the advice of his friend, the accused went to see a superior and gave an account similar to the one he had given his friend.

We now come to the statements which he made to the police. On February 27, he, having consulted solicitors, the accused was interviewed by the police at his solicitors' office. He began by giving the police substantially the same account that he had given to his friend and his superior but added that instead of burying the deceased he had 'dumped' the various parts of her body on a tip. At the police station later that day he amplified his statement by saying that the incident when the deceased 'fell downstairs' occurred at about 7 p.m. on January 17, and that it was the following day, when he found her motionless, that he pulled her upstairs by a rope around her neck and then cut up her body in the bathroom. On the following day after much questioning by the police he changed his account stating that everything had happened on Thursday, January 18 at about 7 a.m. This is what he then said happened. (i) He and the deceased had an argument on the landing in the course of which each slapped the other; he seized the deceased and shook her hard; she dug her nails into him and he pushed her away instinctively, causing her to fall backwards over the handrail, down the stairs head first onto the floor. (ii) He went downstairs immediately to find her motionless and on a very cursory examination discovered no pulse, and no sign of breath but frothy blood coming from her mouth. (iii) Almost immediately thereafter he dragged her upstairs by a rope tied around her neck, placed her in the bath, and cut her neck with a penknife to let out her blood, having already decided to cut up her body and dispose of the pieces.

He agreed that his previous account was untrue and he made a detailed voluntary statement along the lines set out in (i), (ii) and (iii) above describing how subsequently he had cut up and disposed of her body.

In the course of these interviews at the police station, after the defendant had given his revised account, the following conversation took place:

'Officer: How long was it from the time that she went backwards over the handrail to when you started pulling her up the stairs with a piece of rope around her neck? Accused: I went downstairs when she went backwards. I looked at her tried her pulse. I tried to lift her and she wee'd, so I put her down again. Then two girls went past [the glass fronted door] so I covered the door with the blanket. Then I got the piece of rope and pulled her up the stairs'

'Officer: When did you decide you were going to cut the body up

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and dispose of it? *Accused:* Just before I pulled her up the stairs.

Later he was questioned by the officer:

'Q. Is it correct that you hauled [her] to the bathroom, and put her into the bath and then cut her neck with a knife to let the blood out and these were all a continuous series of events? A. Yes, they all happened together.'

Subsequently the police discovered evidence which corroborated the accused's account of how, where and when he had cut up the body. They also found the saw he had used and the shopkeeper who sold it to him. However, the body of the deceased was never found, only some minute fragments of bone, which were discovered in the maisonette. There was thus no expert evidence as to the cause of death. The deceased died either as a result of being pushed and thus caused to fall backwards over the handrail and backwards down the stairs head first onto the floor, or by being strangled with the rope, or by having her throat cut. The Crown conceded that it was not possible for them to prove whether the deceased died as the result of the "fall" downstairs or from what the accused did to the deceased thereafter.

The indictment charged the accused with (i) manslaughter, (ii) obstructing the coroner in the execution of his duty, and (iii) preventing the burial of a corpse. The accused pleaded guilty to the third count, the Crown offered no evidence on the second, and the trial proceeded on the count of manslaughter.

At the close of the Crown's case counsel for the accused stated that he proposed to submit that on the facts proved there was no case of manslaughter capable of going to the jury. It is not easy to follow from the transcript the exact basis of his submissions, but what he appears to have been contending was that (a) it was not possible for the jury to be sure what caused the deceased's death and (b) whether the death was caused as a result of her 'fall' down the stairs or from what the accused subsequently did, believing her to be dead, in neither event was there a *prima facie* case of manslaughter.

The judge, although expressing his reluctance to accept that the accused could be in a better position as a result of his dismembering the body of the deceased, appeared to have been very concerned at what he described as 'an insuperable problem of sentencing', were the accused to be convicted of manslaughter. He expressed the view that the real criminality of the accused's behaviour was in disposing of the body, a view which this court is unable to accept. These views appear to have influenced his decision, which was to withdraw the case from the jury and to direct an acquittal on the ground that the Crown had failed to prove the cause of the death of the deceased.

On the above facts this reference raises a single and simple question, viz, if an accused kills another by one or other of two or more different acts each of which, if it caused the death, is a sufficient act to establish manslaughter, is it necessary in order to found a conviction to prove which act caused the death? The answer to that question is No, it is not necessary to found a conviction to prove which act caused the

MAGISTRATES — Juvenile court — Defendant aged 16 when charged and remanded — Defendant becoming 17 just before hearing of case — Age fixed when defendant first appears or is brought before court in connexion with offence charged — Children and Young Persons Act, 1963, s.29(1) as amended by Children and Young Persons Act, 1969.

R. v. Amersham Juvenile Court. Ex parte Wilson

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MAGISTRATES — Recognizances — Binding over to keep the peace — Refusal by defendant to acknowledge himself bound — Powers of magistrate — Magistrates' Courts Act, 1952, s.91.

Veater v. Glennon

QBD 158

MAGISTRATES — Re-opening of case — Discretion — Prosecution case closed in error.

Matthews v. Morris

QBD 262

MAGISTRATES — Res judicata — Dismissal of prosecution in absence of witnesses — Fresh information preferred.

R. v. Swansea Justices. Ex parte Purvis

QBD 252

MAGISTRATES — Retirement of clerk with magistrates — Need to avoid appearance that clerk taking part in decision on fact — Advice on standard of proof of offence.

R. v. Guildford Justices, Ex parte Harding

QBD 174

MAGISTRATES — Trial — Charges triable "either way" — No evidence offered by prosecution — Substitution of charges triable summarily — Validity.

R. v. Canterbury and St Augustine's Justices. Ex parte Klisiak

R. v. Ramsgate Justices. Ex parte Warren

QBD 344

MAGISTRATES — Trial of cases — Offences of the same or a similar character — Right to trial on indictment — Criminal Law Act, 1977, s.23(7).

R. v. Tottenham Justices. Ex parte Tibble

QBD 269

MAGISTRATES — Sentence — Imprisonment — Consecutive terms — Separate periods for non-payment of separate fines — Magistrates' Courts Act, 1952, s.64(1)(3), s.65(2), sched. 3.

R. v. Southampton Justices. Ex parte Davies

QBD 247

MAGISTRATES — Summary trial — Procedure — Offences of same or similar character — Criminal Law Act, 1977, s.23(7)(a).

R. v. Hatfield Justices. Ex parte Castle

QBD 265

MURDER — See Criminal Law

NATIONAL ASSISTANCE — Accommodation for person in need of care and attention — Charges for accommodation — Provision of accommodation by voluntary organization — Payment of charges by local authority — Reimbursement by person for whom accommodation provided — National Assistance Act, s.26 (3).

Dorset County Council v. Greenham

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OBSCENE PUBLICATION — Obscene display of images on screen — Images derived from video tape — Obscene Publications Act, 1959, s.1(2), (3).
Attorney-General's Reference (No. 5 of 1980)

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OBSCENE PUBLICATION — Powers of search and seizure — Articles destined for export and publication outside the jurisdiction of English courts — Obscene Publications Act, 1959, s.3.
Gold Star Publications, Ltd. v. Director of Public Prosecutions

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OBTAINING PECUNIARY ADVANTAGE BY DECEPTION — See Criminal Law

PRISON — Discipline — Adjudication by board of visitors — Proceedings by prisoner alleging adjudication null and void — Action for declaration — Judicial review — R.S.C., Order 53, r.1.
Heywood v. Hull Prison Board of Visitors

Ch. Div. 25

ROAD TRAFFIC — Breath test — Accident — Driver deliberately driving into gate — Road Traffic Act, 1972, s.8(2).
Chief Constable of Staffordshire v. Lees

QBD 208

ROAD TRAFFIC — Breath test — Refusal — Arrest of person driving — Arrest by police officer on private property of driver — Validity — Road Traffic Act 1972, s.8(5).
Lambert v. Roberts

QBD 256

ROAD TRAFFIC — Causing death by reckless driving — "Reckless" — Direction to jury — Road Traffic Act, 1972, as substituted by s.50(1) of the Criminal Law Act, 1977.
R. v. Lawrence

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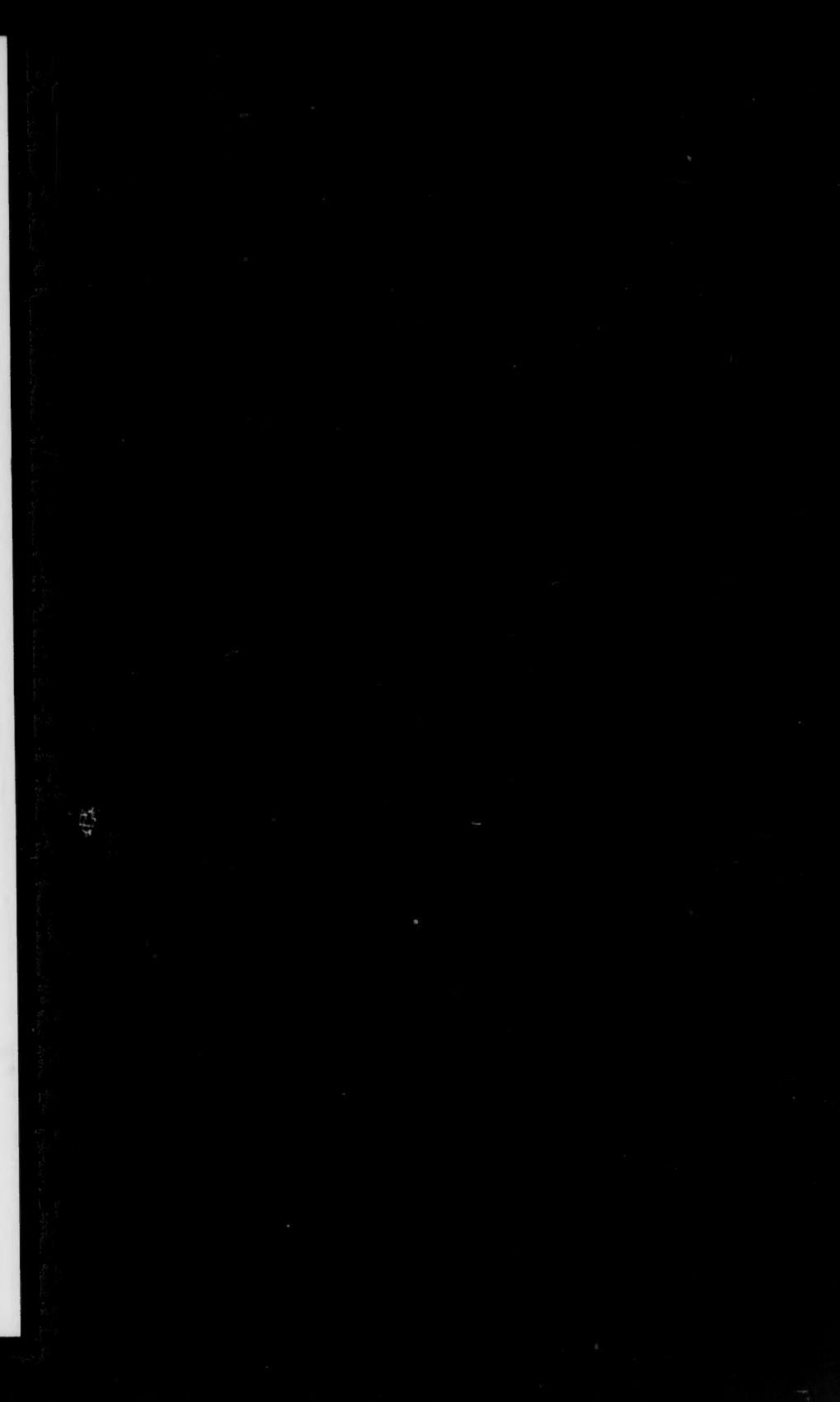
ROAD TRAFFIC — Disqualification of driver — Convictions within proceeding three years — Endorsement of second conviction later than three years period — 'Totting-up' provisions of Road Traffic Act, 1972, s.93(3).
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death. No authority is required to justify this answer, which is clear beyond argument, as was indeed immediately conceded by counsel on behalf of the accused.

What went wrong in this case was that counsel made jury points to the judge and not submissions of law. He was in effect contending that the jury should not convict of manslaughter if the death had resulted from the 'fall', because the push which had projected the deceased over the handrail was a reflex and not a voluntary action, as a result of her digging her nails into him. If, however, the deceased was still alive when he cut her throat, since he then genuinely believed her to be dead, having discovered neither pulse nor sign of breath, but frothy blood coming from her mouth, he could not be guilty of manslaughter because he had not behaved with gross criminal negligence. What counsel and the judge unfortunately overlooked was that there was material available to the jury which would have entitled them to have convicted the accused of manslaughter, whichever of the two sets of acts caused her death. It being common ground that the deceased was killed by an act done to her by the accused and it being conceded that the jury could not be satisfied which was the act which caused the death, they should have been directed in due course in the summing-up to ask themselves the following questions: (i) 'Are we satisfied beyond reasonable doubt that the deceased's "fall" downstairs was the result of an intentional act by the accused which was unlawful and dangerous?' If the answer was No, then they should acquit. If the answer was Yes, then they would need to ask themselves a second question, namely: (ii) 'Are we satisfied beyond reasonable doubt that the act of cutting the girl's throat was an act of gross criminal negligence?' If the answer to that question was No, then they would acquit, but if the answer was Yes, then the verdict would be guilty of manslaughter. The jury would thus have been satisfied that, whichever act had killed the deceased, each was a sufficient act to establish the offence of manslaughter.

The facts of this case did not call for 'a series of acts direction' following the principle in *Thabo Meli v. R* (1). We have accordingly been deprived of the stimulating questions whether the decision in *R. v. Church* (2) correctly extended that principle to manslaughter, in particular to 'constructive manslaughter', and, if so, whether that view was part of the ratio decidendi.

Solicitors: Director of Public Prosecutions: Kaye & Martin, Hull.

Reported by G.F.L. Bridgman, Esq., Barrister.

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(1) [1954] 1 All ER 373; [1954] 1 WLR 228
(2) 129 JP 366; [1965] 2 All ER 72; [1966] 1 QB 59.

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COURT OF APPEAL
(Eveleigh, L.J., Cantley, J., and Kilner Brown, J)
December 5, 1980

R. v. MELLOR

Criminal Law – Sentence – Young offender – Offender serving sentence of imprisonment when further sentence passed on him – "Sentence of imprisonment" – Release on parole – Criminal Justice Act, 1967, s.3(1), s.3(2).

i

By s.3(1) of the Criminal Justice Act, 1961, a sentence of imprisonment shall not be passed on a young offender except for a term not exceeding six months. By s.3(2) of the Act s.3(1) shall not apply in the case of a person who is serving a sentence of imprisonment at the time when the court passes the sentence which it is sought to be set aside.

ii

On June 16, 1978, the appellant was sentenced to three years' imprisonment. On November 14, 1979, he was released on parole. On November 27, then aged 20, he was sentenced in the Crown Court to eighteen months' imprisonment made up of twelve months' imprisonment for taking a vehicle without consent and theft, concurrent, and six months' imprisonment consecutive for handling. On his appeal to the Court of Appeal it was contended on his behalf that the Crown Court had no power to pass the sentence of eighteen months' imprisonment because of the restrictions placed by s.3(1) of the Criminal Justice Act, 1967, on the sentencing of young offenders.

iii

Held: (dismissing the appeal): a person released on parole was under some constraints by virtue of his prison sentence, he was in fact serving his sentence and was still subject to that sentence; the appellant, therefore, was a person "serving a sentence of imprisonment" at the material time, and the restrictions imposed by s.3(1) did not apply to him.

iv

This case should be compared with *R. v. Orpwood & Another* (post p.403).

Appeal: by Gary Mellor against a sentence imposed on him by Warwick Crown Court.

Eveleigh, L.J.

v

A. Engel for the defendant.
S. Waine for the Crown

5th December, 1980. EVELEIGH L.J. read the following judgment of the court: This case was referred by the single judge to the full court, which treated that reference as an appeal against sentence and gave the necessary leave.

vi

On 9th April, 1980, in the Crown Court at Warwick the appellant was sentenced to a total period of 18 months' imprisonment. That sentence was made up of twelve months' imprisonment for taking a vehicle without consent, six months' imprisonment concurrent for theft and six months' imprisonment consecutive for handling. Two offences were taken into consideration. He was twenty years of age at that time. On 16th June, 1978, the appellant had been sentenced to three years' imprisonment. He had been released on parole on 14th November, 1979, and his licence was due to expire on 23rd April, 1981. The first two offences were committed on 27th November, 1979, two weeks after his release from prison, when he was staying at a probation hostel. He was arrested that same day but was granted bail.

The third offence was committed on 5th December, 1979, while he was on bail.

It is, however, submitted that the court had no power to pass a sentence of eighteen months' imprisonment because of the restrictions placed on the sentencing of young offenders by s.3(1) of the Criminal Justice Act 1961. That subsection reads:

"Without prejudice to any other enactment prohibiting or restricting the imposition of imprisonment on persons of any age, a sentence of imprisonment shall not be passed by any court on a person within the limits of age which qualify for a sentence of Borstal training except – (a) for a term not exceeding six months; or (b) (where the court has power to pass such a sentence) for a term of not less than three years."

The case is clearly covered by those words, but the question now arises whether or not it falls within the provisions of s.3(2), which reads as follows:

"Subsection (1) of this section shall not apply in the case of a person who is serving a sentence of imprisonment at the time when the court passes sentence; and for the purpose of this subsection a person sentenced to imprisonment who has been recalled or returned to prison after being released subject to supervision or on licence, and has not been released again or discharged, shall be treated as serving the sentence."

Were it not for the second half of that subsection, we would be of the opinion that a person released on parole was serving a sentence of imprisonment. On revocation of the parole licence by the Secretary of State or by the court, s.62 of the Criminal Justice Act, 1967, provides that the offender shall be liable to be detained in pursuance of his sentence. However his sentence has not been suspended while on parole (as it is, for example, in the case of a person discharged temporarily on account of ill-health): see s.28 of the Prison Act, 1952; and he will be required to serve the time remaining from the date of revocation to the end of the sentence (with remission) or thirty days, whichever is the greater: see para 4 of the Practice Note of 19th December, 1975, ([1976] 1 WLR 122). A person released on parole is not free to do exactly as he wishes, but is under some constraints by virtue of his prison sentence. In such circumstances, ie the progressive reduction of the period to be served and the lack of total liberty, he is in fact serving his sentence but doing so 'in the community.' He is not behind the prison walls but he is still subject to his prison sentence.

It is submitted however that the second half of s.3(2), by making special provision in relation to supervision or licence, indicates that a person released on supervision or on licence is not serving a sentence of imprisonment. By analogy it is said that a person released on parole is also not serving a sentence of imprisonment. It therefore becomes necessary to see why the references to supervision and licence were

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made in the Criminal Justice Act 1961.

Section 20 of that Act (repealed by the Criminal Justice Act, 1967, ss.60(7), 103(2) and sch.7, Part I; see now s.63 of the 1967 Act) made provision for supervision of certain prisoners after release. That section reads:

'(1) the provisions of Part I of the third schedule to this Act shall have effect with respect to the supervision after release from prison of persons to whom this section applies, and the return to prison of such persons in the event of failure to comply with the requirements of their supervision.

'(2) This section applies to persons serving the following sentences of imprisonment (being sentences commencing after such date as may be prescribed by order of the Secretary of State), that is to say — (a) a sentence for a term of four years or more; (b) a sentence for a term of six months or more passed on a person who has served at least one previous sentence, being a sentence of imprisonment for a term of three months or more or a sentence of corrective training, preventive detention or Borstal training; and (c) a sentence for a term of six months or more passed on a person appearing to the Prison Commissioners to have been under the age of twenty-six at the commencement of the sentence, but does not apply to a person serving a sentence of imprisonment for life . . .'

By para 1 of sched.3 the period of supervision is twelve months from the date of release. Paragraph 5 provides for the return to prison for a term

'not exceeding whichever is the shorter of the following, that is to say — (a) a period equal to one third of the term of imprisonment to which he was originally sentenced, or, if that period exceeds six months, a period of six months; (b) a period equal to so much of the period of supervision as was unexpired at the date of the laying of the information by which the proceedings were commenced.'

There are various situations which could result in a person being detained in a prison after the date of the expiration of his original sentence. Not every person detained in prison is 'serving a sentence of imprisonment,' for example, a person on remand. The status of a person returned to prison in case of breach of supervision might be thought to be equivocal. This difficulty is recognised in para 16 of sched.3, for it provides:

'For the purpose of Part III of this Act, a person who has been sent back to prison under paragraph 5 or paragraph 10 of the schedule, and has not been released again, shall be deemed to be serving part of his original sentence, whether or not the term of that sentence has in fact expired.'

However, while that paragraph was treating such a person as serving part of his original sentence, it was doing so only for the purposes of

Part III of the Act. Section 3(1) is contained in Part II of the Act. In order to remove any ambiguity with regard to s.3(2), a special reference was necessary to the position of a person under supervision.

Section 25 of the Prison Act, 1952, provided for remission for good conduct. The relevant subsections read:

'(2) If it appears to the Prison Commissioners that a person serving a sentence of imprisonment was under the age of twenty-one years at the commencement of his sentence, they may direct that instead of being granted remission of his sentence under the rules he shall, at any time on or after the day on which he could have been discharged if the remission had been granted, be released on licence under the following provisions of this section.

'(3) A person released on licence under this section shall until the expiration of his sentence be under the supervision of such society or person as may be specified in the licence and shall comply with such requirements as may be specified . . .

'(6) Where the unexpired part of the sentence of a person released under subsection (2) of this section is less than six months, subsections (3) to (5) of this section shall apply to him subject to the following modifications — (a) the period for which he is under supervision under subsection (3) and is liable to recall under subsection (4) shall be a period of six months from the date of his release under the said subsection (2); (b) if he is recalled under subsection (4) the period for which he may be detained thereunder shall be whichever is the shorter of the following, that is to say — (i) the remainder of the said period of six months; or (ii) the part of his sentence which was unexpired on the date of his release under the said subsection (2), reduced by any time during which he has been so detained since that date; and he may be released on licence under subsection (5) at any time before the expiration of that period.'

(Subsections (2) to (6) have been repealed by the Criminal Justice Act, 1967, s.103(2) and sched.7, Part I.)

So again it is possible for a person to be detained at a time when his original sentence will have expired. While sub-s.3 of s.25 speaks of such a person as being under supervision, strictly speaking he is release on licence under sub-s.(2). The marginal note to s.25 reads:

'Remission for good conduct and release on licence of persons sentenced to terms of imprisonment.'

Thus we find a reference to licence in s.3(2) of the Criminal Justice Act 1961.

In our opinion, therefore, the references in s.3(2) of the 1961 Act were necessitated by the provisions of s.20 of the 1961 Act and s.25 of the 1952 Act. They were dealing with those special cases and the reasons for doing so can have no application to the position of a person on parole by virtue of the provisions of a subsequent Act of Parliament, namely the Criminal Justice Act, 1967. The appellant in the present

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case, therefore, was a person serving a sentence of imprisonment and the restrictions imposed in s.3(1) of the 1961 Act do not apply.

We now turn to the sentence of eighteen months itself. That matter can be shortly dealt with. The defendant had been sentenced on 16th June, 1978, to three years' imprisonment for robbery. That sentence had not expired by the time the sentence of eighteen months' imprisonment now appealed against was imposed. One has only to say in this case that he was on parole at the time of the commission of the first of the offences for which he was sentenced on 9th April 1980, and one of those, the third offence, was committed, as has been said, while he was on bail. It is quite obvious that this appellant had no intention whatsoever of observing the law, and this court is of the view that the sentence of eighteen months was correct in every way. This appeal therefore is dismissed.

Solicitors: *Field & Sons*, Leamington Spa.

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Reported by G.F.L. Bridgman, Esq., Barrister.

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COURT OF APPEAL
(Lord Lane, C.J., Thompson, J., and Glidewell, J.)
February 12, 1981

R. v. Orpwood

Court of Appeal

R. v. ORPWOOD and ANOTHER (B)

Criminal Law – Sentence – Young offender – Offender serving sentence of imprisonment when further sentence passed on him – "Sentence of imprisonment" – Release on licence – Criminal Justice Act, 1967, s.3(1)(2).

By s.3(1) of the Criminal Justice Act, 1961, a sentence of imprisonment shall not be passed on a young offender except for a term not exceeding six months. By s.3(2) of the Act subsection s.3(1) shall not apply in the case of a person who is serving the sentence of imprisonment at the time when the court passes a sentence which it is sought to be set aside.

On November 7, 1977, the appellant B, then a young person, was sentenced in the Crown Court to three years' imprisonment for robbery and wounding with intent. He was released on licence and on October 21, 1980, while on licence he was sentenced to fifteen months' imprisonment on a charge of attempted burglary to which he pleaded guilty. On his appeal against this sentence,

Held: a young person who has been released on licence and not recalled could not be said to be serving a sentence within s.3(2); accordingly s.3(1) applied in B's case and the sentence of fifteen months was not one which it was open to the court to pass; B's sentence would be reduced to one of six months.

This case should be compared with *R. v. Mellor* (p.398). iii

Appeal by Gary Patrick Brooker ('B') against a sentence of fifteen months' imprisonment passed on him at Canterbury Crown Court.

G. Davis for the appellant

LORD LANE C.J., delivered the following judgment of the court: On 22nd September, 1980, at Dartford Magistrates' Court, these appellants, as they now are, leave having been given, pleaded guilty to a joint charge of attempted burglary. They were committed for sentence. They appeared in the Crown Court at Canterbury on 21st October and each was sentenced to fifteen months' imprisonment. They both now appeal against that sentence. Brooker also applies for an extension of time of 87 days, which we grant.

The facts of the case are these. On 18th July, 1980, shortly after midnight, a 72-year-old man was in bed at his home in Swanley, when he was awakened by these two youths knocking at his front door. They had equipped themselves with stockings, which they had pulled over their heads in order to conceal their features. They went round to the back of the house. They removed a piece of plastic which in fact covered a ventilator. They apparently thought it covered a whole pane of glass. By removing it, they thought they would have been enabled to enter the house. That was wrong. They went round to the front of the house once again, knocked on the door. The elderly gentleman opened the door and saw the appellants. They ran off. He slammed the door and shouted to his neighbours. The police were called and they arrested

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these two appellants very shortly afterwards. They prevaricated for a time but eventually admitted the offence. They said that they were trying to get into the house in order to steal money from the meter. They said that they knocked on the door to see whether the house was empty (it seems unnecessary to have equipped themselves with masks if that had been the case) and that they had been drinking.

The burden of this case is a technical one, and it arises in this way. At the time of the sentence Brooker was twenty years of age. Thus the power to pass a sentence of imprisonment on him was governed by s.3(1) of the Criminal Justice Act, 1961, the section which has given this court so much trouble in the past. It reads as follows:

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'Without prejudice to any other enactment prohibiting or restricting the imposition of imprisonment on persons of any age, a sentence of imprisonment shall not be passed by any court on a person within the limits of age which qualify for a sentence of Borstal training except—(a) for a term not exceeding six months; or (b) (where the court has power to pass such a sentence) for a term of not less than three years.'

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That upper limit of three years is in certain circumstances reduced to eighteen months (see s.3(3) of the 1961 Act), but in this case there is no doubt that Brooker's record would lead the court, had it been so minded, to pass a sentence of eighteen months or more.

The problem arises thus. Section 3(2) of the 1961 Act reads as follows:

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'Subsection (1) of this section shall not apply in the case of a person who is serving a sentence of imprisonment at the time when the court passes sentence; and for the purpose of this subsection a person sentenced to imprisonment who has been recalled or returned to prison after being released subject to supervision or on licence, and has not been released again or discharged, shall be treated as serving the sentence.'

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Brooker's position was this. He had been sentenced at Maidstone Crown Court in 1977 to three years' imprisonment for robbery and wounding with intent. That sentence was imposed on him on 7th November, 1977. He was then a young person and, owing to the various provisions which it is not necessary for this court to read, young persons are not given remission, but are released on licence subject to supervision, and indeed that had happened to Brooker. At the time when the instant offence was committed, he was on licence.

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The question is: Can it be said that he was serving a sentence of imprisonment at the time when the court, that is to say the court we are considering, passed sentence? It appears to this court *prima facie* that the second half of that subsection, which I will read again, makes it clear that he was not serving a sentence. The words are:

'and for the purpose of this subsection a person sentenced to imprisonment who has been recalled or returned to prison after





being released subject to supervision or on licence, and has not been released again or discharged, shall be treated as serving the sentence.'

We have had our attention drawn to a decision of this court on 5th December, 1980, *R v. Mellor* (1) where a person had been released on parole licence. It seems to us that, whatever may have been the situation in *R. v. Mellor*, the words of s.3(2) of the Criminal Justice Act, 1961, must mean that a person who has, as a young person, been released on licence and not recalled is not serving a sentence of imprisonment. Had it been intended that such a person should be regarded as serving a sentence, the section would have read as follows: '... and for the purpose of this subsection a person sentenced to imprisonment who has been released subject to a supervision or on licence, whether or not he has been recalled or returned to prison thereafter, shall be treated as serving the sentence.' But it does not so read. Consequently we have reluctantly come to the conclusion that the sentence imposed on Brooker of fifteen months was not a sentence which it was open to the court to pass. It should have been a sentence either of six months or less or eighteen months or more. Consequently so far as Brooker is concerned, although we are reluctant to do so, we are forced to reduce his sentence from fifteen months to six months.

That leaves the problem of Orpwood. May we say immediately that in the view of this court, for the sort of offence they have committed, fifteen months was a lenient sentence, and this court, if left to its devices at the trial, would have sentenced each of these young men to eighteen months' imprisonment at a minimum. But once again the tentacles of s.3(2) have grasped the court. We have been forced to reduce Brooker's sentence against our better judgement. The question is whether justice demands that Orpwood should have his sentence likewise reduced. His counsel disclaims that there would be any feeling of unfairness in Orpwood's mind were we to leave his sentence, which was perfectly legal, at fifteen months. We feel however, in the light of their respective records, Brooker being much the more serious criminal according to his previous record, that it would be unfair were we to leave Orpwood at fifteen months, having been forced to reduce Brooker's sentence. Consequently Orpwood, who should consider himself exceedingly lucky in at least three respects, as a matter of fairness should likewise have his sentence reduced.

Consequently each of these appeals is allowed to the extent that the sentence of fifteen months' imprisonment in each case is reduced to six.

Solicitors: *Chancellor & Ridley*, Dartford.

Reported by G.F.L. Bridgman, Esq., Barrister.

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(1) *ante p.398*

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Court of Appeal

COURT OF APPEAL

(Lord Lane, C.J., Pain, J., and M Stuart-Smith, J.)

May 19, 1981

R. v. GALBRAITH

Criminal Law – Trial – Submission of "No case" – Grant of application – Crown evidence taken at its highest such that a jury properly directed could not properly convict on it.

i The applicant being charged at the Central Criminal Court with affray, it was submitted on his behalf at the close of the case for the prosecution that there was no case for him to answer. The judge rejected that submission, the applicant was convicted, and he applied for leave to appeal against his conviction.

ii Held: where a judge came to the conclusion that the evidence for the Crown, taken at its highest, was such that a jury properly directed could not properly convict on it, it was his duty, on a submission being made, to stop the case, but where the evidence for the Crown was such that its strength or weakness depended on the view to be taken of a witness's reliability or other matters which were generally speaking within the province of the jury and where on one possible view of the facts there was evidence on which a jury could properly come to the conclusion that the defendant was guilty, then the judge should allow the matter to be tried by the jury; the present case was eminently one where the jury should be left to decide the weight of the evidence on which the Crown based their case; it was not a case where the judge would have been justified in saying that the evidence for the Crown, taken at its highest was such that the jury, properly directed, could not properly convict on it; the application was refused.

iii Application for leave to appeal against conviction.

R. Simpson, Q.C., and H. Godfrey for the applicant.
A. Green and S. Edwards for the Crown.

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Lord Lane, C.J.

May 19, 1981. LORD LANE, C.J. read the following judgment of the court: On November 13, 1979, at the Central Criminal Court the applicant was convicted by a majority verdict of affray and was sentenced to four years' imprisonment. He now applies for leave to appeal against that conviction, the application having been referred to this court by the single judge.

v The facts of the case were these. On November 20, 1978, at the Ranelagh Yacht Club, Putney Bridge, in the early hours of the evening a fight broke out in the bar. There were a number of people present, amongst them being Darke, Begbe, Bohm, Dennis and Bindon. Knives were used. At least three men were stabbed, Darke fatally, Bindon seriously, and Dennis less so. There was in these circumstances no doubt that there had been an affray. The only question for the jury to decide was whether it had been established with a sufficient degree of certainty that the applicant had been unlawfully taking part in that affray.

vi At the close of the Crown's evidence, a submission was made by counsel for the applicant that there was no case for the applicant to answer. The judge rejected that submission. The principal ground of

appeal to this court is that he was wrong in so doing. There are other subsidiary grounds of appeal which we shall have to examine in due course.

We are told that some doubt exists as to the proper approach to be adopted by a judge at the close of the Crown's case on a submission of 'no case' (see Archbold on Pleading, Evidence and Practice in Criminal Cases (40th edn, Fifth Supplement to s575) and *R. v. Tobin* (1).

There are two schools of thought: (i) that the judge should stop the case if, in his view, it would be unsafe (alternatively unsafe or unsatisfactory) for the jury to convict; (ii) that he should do so only if there is no evidence on which a jury properly directed could properly convict. Although in many cases the question is one of semantics, and though in many cases each test would produce the same result, this is not necessarily so. A balance has to be struck between, on the one hand, a usurpation by the judge of the jury's functions and, on the other, the danger of an unjust conviction.

Before the Criminal Appeal Act, 1966, the second test was that which applied. By s.4(1)(a) of the Act however the Court of Appeal was required to allow an appeal if it was of the opinion that the verdict should be set aside on the ground that 'under all the circumstances of the case it is unsafe or unsatisfactory'. It seems that thereafter a practice grew up of inviting the judge at the close of the Crown's case to say that it would be unsafe (or sometimes unsafe or unsatisfactory) to convict on the Crown's evidence and on that ground to withdraw the case from the jury. Whether the change in the powers of the Court of Appeal can logically be said to justify a change in the basis of a 'no case' submission, we beg leave to doubt. The fact that the Court of Appeal has power to quash a conviction on these grounds is a slender basis for giving the trial judge similar powers at the close of the Crown's case.

There is however a more solid reason for doubting the wisdom of this test. If a judge is obliged to consider whether a conviction would be 'unsafe' or 'unsatisfactory', he can scarcely be blamed if he applies his views as to the weight to be given to the Crown's evidence and as to the truthfulness of their witnesses and so on. That is what Lord Widgery CJ said in *R. v. Barker* (2) was clearly not permissible:

'even if the judge had taken the view that the evidence could not support a conviction because of the inconsistencies, he should nevertheless have left the matter to the jury. It cannot be too clearly stated that the judge's obligation to stop the case is an obligation which is concerned primarily with those cases where the necessary minimum evidence to establish the facts of the crime has not been called. It is not the judge's job to weigh the evidence, decide who is telling the truth, and to stop the case merely because he thinks the witness is lying. To do that is to usurp the function of the jury . . .'

Although this was a case where no submission was in fact made, the principle is affected.

- (1) [1980] Crim LR 85
- (2) (1977) 65 Cr App R 287

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Some of the difficulties have arisen from the subsequent case of *R. v. Mansfield* (3) where Lawton LJ said:

'Unfortunately since this practice started (sc withdrawing a case from the jury on the ground that a conviction on the evidence would be unsafe) . . . there has, it seems, been a tendency for some judges to take the view that if they think that the main witnesses for the prosecution are not telling the truth then that by itself justifies them in withdrawing the case from the jury. Lord Widgery CJ in his judgment in *R. v. Barker* (2) pointed out that this was wrong . . . [Lawton LJ then cited part of the passage we have already quoted, and continued:] Counsel for the appellant intended to submit to the judge that some of the evidence was so conflicting as to be unreliable and therefore if the jury did rely on it the verdict would be unsafe. In our judgment he was entitled to make that submission to the judge and the judge was not entitled to rule that he could not.'

On one reading of that passage it might be said to be inconsistent both with *R. v. Barker* (2) and with the earlier part of the judgment itself. It is an illustration of the danger inherent in the use of the word "unsafe"; by its very nature it invites the judge to evaluate the weight and reliability of the evidence in the way which *R. v. Barker* (2) forbids and leads to the sort of confusion which now apparently exists. "Unsafe", unless further defined is capable of embracing either of the two schools of thought and this we believe is the cause of much of the difficulty which the judgment in *R. v. Mansfield* (3) has apparently given. It may mean unsafe because there is insufficient evidence on which a jury could properly reach a verdict of guilty; it may on the other hand mean unsafe because in the judge's view, for example, the main witness for the Crown is not to be believed. If it is used in the latter sense as the test, it is wrong. We have come to the conclusion that, if and in so far as the decision in *R. v. Mansfield* (3) is at variance with that in *R. v. Barker* (2), we must follow the latter.

How then should the judge approach a submission of "no case"? (i) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will, of course, stop the case. (ii) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the de-

(2) (1977) 65 Cr App R 287

(3) 142 JP 66; [1978] 1 All ER 134

fendant is guilty, then the judge should allow the matter to be tried by the jury. It follows that we think the second of the two schools of thought is to be preferred. There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge.

We turn now to the evidence in this case. It was admitted that the applicant had gone to the club with Darke and Begbe and, using a false name, had signed them in. They had later been joined by Bohm. It was further not disputed that at the conclusion of the fighting the applicant was in the bar and, much to his credit, was helping a dying Darke. He did not go into the witness box, but the account of events which he gave in a self-exculpatory statement to the police, reiterated in a statement from the dock, was that he had at the material time when the affray was in progress not been in the bar at all but had been downstairs in the lavatory.

There were two principal pieces of evidence called by the Crown which tended to disprove that assertion and to show that he was in the bar taking an active part in the affray. The first was a witness called John Gilette. He said that Darke had attacked Bindon and that at that time there were three men with Darke. They all had knives. He then described the three men. One description plainly referred to Begbe, another to Bohm and the third was an accurate description of the applicant. These men were described by Gilette as standing by the fight watching with knives out in a threatening way. He had attended an identification parade on 19th February, 1979. On that parade the applicant was standing. Gilette, however, said he was not able to point out anyone on that parade whom he recognised as having been in the club that night.

The second piece of evidence was from a witness called Cook. He was the doorman of the club and was a very reluctant witness. Leave was eventually given to treat him as hostile. Cook described how the applicant, or a man who, from the description given by Cook, was plainly and admittedly the applicant, had signed Darke and Begbe into the club at about 4.15 p.m. At 6.15 p.m. he heard glass breaking and people shouting in the bar, so he went upstairs. When he got there Dennis told him that he had been stabbed and pointed to a group of people standing by the juke box. This group was described by Cook as being "John Darke's party, the man with the beard, the fair-haired chap and the bloke with the twisted nose". The reference to the fair-haired chap was plainly intended to be a reference to the same person as had signed the other two in at the door two hours previously, namely the applicant. In cross-examination he said that he could have been mistaken in thinking that the fair-haired man with Darke by the juke box was the same blonde man who signed them in.

In addition to these two pieces of evidence there was a further witness called Stanton who gave evidence that, when Darke was attacking Bindon as Bindon lay on the floor, a little guy went up to Darke and said: "Stop it John, you'll kill him." This man was described by Stanton in a way which would fit the applicant. However, in cross-examination, Stanton said the little guy was not the applicant. There was a body of evidence which seemed to indicate that there had been

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some form of agreement between the witnesses that they would, so far as possible, back-pedal from the statements which they had made to the police immediately after the incident had taken place.

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In these circumstances it seems to us that this was eminently a case where the jury should be left to decide the weight of the evidence on which the Crown based their case. It was not a case where the judge would have been justified in saying that the Crown's evidence taken at its highest was such that the jury properly directed could not properly convict on it.

Lord Lane, C.J.

Of the remaining subsidiary grounds which the applicant advances in his perfected grounds of appeal, the only one that has any substance is the complaint that the learned judge misdirected the jury in directing them that they could regard Bindon's evidence of having shaken hands with the co-defendants Bohm and the applicant and having said to them "let bygones be bygones" in a cell at the magistrates' court as evidence against the applicant. We are inclined to agree that strictly speaking that was a misdirection. The evidence was certainly part of the background of the case and an important part of the background, but it could not properly be said to be evidence against the applicant. However, this minor error on the part of the judge can have had no possible effect on the outcome of the case and can safely be disregarded. There is nothing in the other grounds of appeal which makes it necessary to comment on them.

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Accordingly, as indicated at the close of the argument before us, the application for leave to appeal against conviction is refused.

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Solicitors: *Henry Milner & Co; Director of Public Prosecutions.*

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Reported by G.F.L. Bridgman, Esq., Barrister.

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R. v. Cunningham

House of Lords

Lord Hailsham of St. Marylebone

HOUSE OF LORDS

(Lord Hailsham of Marylebone, Lord Wilberforce, Lord Simon of Glaisdale, Lord Edmund-Davies, and Lord Bridge of Harwich)

R. v. CUNNINGHAM

Criminal Law – Murder – Intent to do grievous bodily harm but not to kill.

The appellant was charged with the murder of a man known as "Kim" whose death was due to a fracture of the skull and subdural haemorrhage caused by repeated blows from a chair or part of a chair which he received from the appellant. At the trial the appellant asserted that he had not intended to kill "Kim", but there was ample evidence that he intended to inflict grievous bodily harm, whether or not that was defined as really serious injury. The judge directed the jury that the sole question for them was whether when the appellant had inflicted the injuries on "Kim" he intended to do him really serious harm; if the answer to that question was "Yes" they should find him guilty of murder, but if "No", they should find him not guilty of murder but guilty of manslaughter. An appeal by the appellant to the Court of Appeal was dismissed and he appealed to the House of Lords by leave of an Appeal Committee of the House.

Held: the judge's summing-up was impeccable; a person was guilty of murder by reason of his unlawfully killing another to whom he intended to do grievous bodily harm; the appeal would be dismissed.

Appeal by Anthony Barry Terence Cunningham against a decision of the Court of Appeal.

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*G. Cooke QC and A. Speight for the appellant.
L. Blom-Cooper QC and L. Giovene for the Crown.*

Their Lordships took time for consideration.

8th July, 1981. The following opinions were delivered.

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LORD HAILSHAM OF ST MARYLEBONE, L. C., 'My Lords, on 14th February, 1980, the appellant was arraigned on an indictment accusing him of the murder of a Persian national named Korosh Amine Natghie (known as 'Kim') on 8th October, 1979. There was a second count of unlawful wounding with which we are not concerned. To the charge of murder the appellant pleaded that he was indeed guilty of the manslaughter of Kim, but that he was not guilty of his murder. He was tried before Lawson, J., and a Kent jury and on 18th February, 1980, he was duly convicted of murder. His appeal against conviction was dismissed by the Court of Appeal, Criminal Division, consisting of Lord Lane, C.J., Boreham and Ewbank, J.J., on 4th December, 1980. They refused leave to appeal to the House of Lords, but certified that the following point of law of general public importance was involved in the appeal: 'Whether a person is guilty of murder by reason of his unlawfully killing another intending to do grievous bodily harm.' On 19th March, 1981, the appellant was given leave to appeal by an Appeal Committee of your Lordships' House. In these circumstances the appeal comes before your Lordships for decision.'

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Broadly speaking the facts are not in dispute. The victim died on 8th October, 1979, when, in view of the fact that he was virtually already dead, the breathing machine on which he had been placed on 5th October was finally switched off. Kim's death was due to a fracture of the base of the skull and a subdural haemorrhage as the result of an incident on 30th September, 1979, at the Royal Albion public house, Margate. These injuries were caused by blows received from the appellant, which included repeated blows from a chair or part of a chair, some of which were inflicted while Kim lay defenceless on the ground. The attack by the appellant on Kim was unprovoked, but motivated by jealousy. The appellant suspected Kim, wrongly it seems, of associating sexually with the appellant's former mistress whom the appellant planned to marry. At no time did the appellant deny the attack or that the attack was the cause of death. The point decided by the Court of Appeal in *R. v. Steel, R. v. Malcherek* (1) was neither taken nor argued. From the start, however, he asserted that he had not intended to kill the deceased. There was, however, ample evidence from which the jury could infer, as they evidently did, that he did intend to inflict grievous bodily harm, whether or not this is defined as 'really serious injury'.

Constrained by previous authorities, Lawson, J., directed the jury that the sole question for them was:

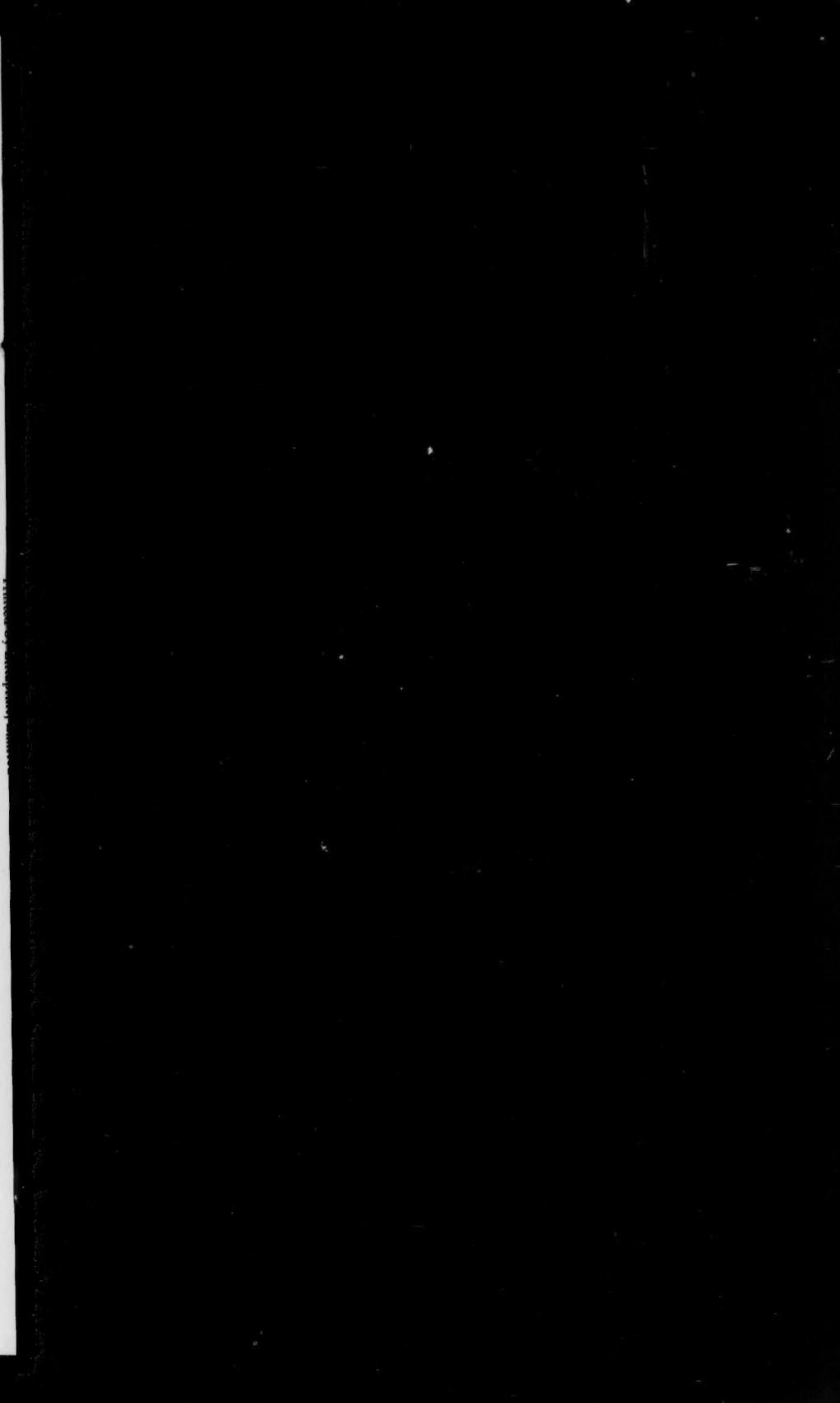
'As a matter of law, the question of fact on which your verdict depends is solely this . . . at the time when the defendant inflicted the injuries on Kim . . . did he intend to do him really serious harm? If the answer to that question is Yes, you find him guilty of murder. If the answer to the question is No, then you find him not guilty of murder, but guilty of manslaughter.'

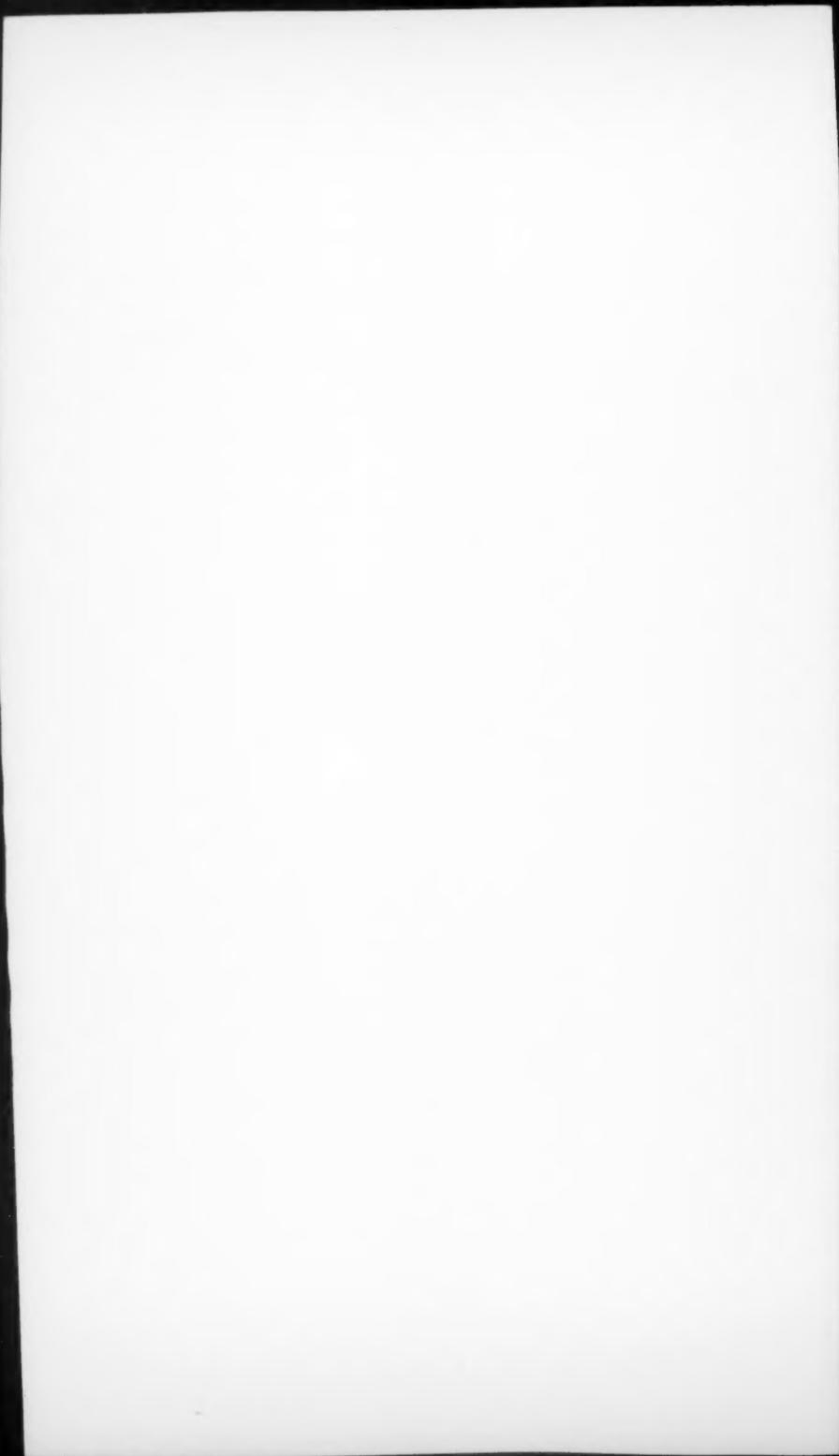
There were further directions to the same effect later in the summing-up, and on a subsequent request by the jury for further instruction on the difference between murder and manslaughter, but they do not alter the point at issue. This direction was rightly characterised by Lord Lane, C.J., in the course of delivering the judgment of the Court of Appeal as 'by reason of a number of decisions . . . binding on this court . . . correct and impeccable'. The sole question, therefore, for your Lordships' House is whether these decisions, binding on both courts below, were correctly or wrongly determined. The assumption which must be made for the purpose of determining the appeal is that the appellant in inflicting the fatal injuries on the deceased did intend to inflict really serious injury but did not intend to kill him. In the circumstances of the judge's direction, there can be no question of applying the proviso.

Murder has been traditionally defined as unlawful killing with malice aforethought. It was this element of malice aforethought which rendered the offence unclergiable after the reign of Henry VIII (see my speech in *Hyam v. Director of Public Prosecutions* (2). It is, of course,

(1) ante p.329

(2) 138 JP 374; (1975) AC 55





common ground that malice aforethought at least includes an intention to kill. The question is how nearly to this intention malice must be confined to constitute the offence of murder. The Homicide Act, 1957, abolished the species of malice known as 'constructive' but it has hitherto been accepted doctrine that the 1957 Act did not abolish the doctrine, in my view rather unfortunately, known as 'implied malice': see s.1(1) of the Act: *R. v. Vickers* (3) and *Hyam* (2). I call the label unfortunate because the 'malice' in an intention to cause grievous bodily harm is surely express enough. The question is whether the fact that it falls short of an intention to kill and may fall short of an intent to endanger life is enough to exclude an unlawful killing resulting from an act inspired by this intention from the ambit of the crime of murder. The intermediate doctrine which adds on an intention to endanger life to the positive intention to kill as sufficient mens rea to complete the offence need not be considered until I consider Lord Diplock's dissenting speech in *Hyam* (2). At the other end of the spectrum, it is established that, since s.8 of the Criminal Justice Act, 1967, the test whether malice is express or implied is subjective (see *Hyam*). The definition of grievous bodily harm means 'really serious bodily harm' in current English usage (see *Director of Public Prosecutions v. Smith* (4), *R. v. Metharam* (5), *Hyam v. Director of Public Prosecutions* (2), all disapproving *R. v. Ashman* (6)).

Counsel for the appellant understandably founded his case on the powerful dissenting opinion of Lord Diplock in *Hyam*, concurred in by Lord Kilbrandon, and asked, if necessary, your Lordships to avail themselves of the practice direction on judicial precedent (*Note* [1966] 3 All ER 77, [1966] 1 WLR 1234) to give effect to it. I say 'if necessary', because counsel properly drew our attention to the somewhat Delphic italicised phrase employed by Lord Cross ([1975] AC 55 at 98) in adding his weight to the opinions of what became the majority in an otherwise equally divided House. In order to dispose first of this minor point I do not believe that your Lordships could give effect to the submission of counsel that *R. v. Vickers* (3) was wrongly decided without invoking the practice direction. However apparently ambiguous the italicised phrase, there is no doubt on which side Lord Cross's vote was cast, and, even if there were any doubt about this, *Vickers* was effectively indorsed by your Lordships' House in *Director of Public Prosecutions v. Smith* (4) which for this purpose has not been overtaken by the Criminal Justice Act, 1967. In order to determine the appeal in favour of the appellant and to give effect to Lord Diplock's opinion it would be necessary, in my view, not merely to override *Vickers* (3) but to disregard the indorsement of it in *Smith* (4) and *Hyam* (2) notwithstanding that the exact point in *Hyam* was con-

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(2) 138 JP 374; [1975] AC 55
 (3) 121 JP 510; [1957] 2 QB 664

(4) 124 JP 473; [1961] AC 290
 (5) [1961] 3 All ER 200
 (6) (1858) 1 F & F 88

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cerned with the proposition formulated in art 264(b) in Stephen's Digest of the Criminal Law (9th edn, p.212), while the present case is concerned with the part of the proposition formulated in art.264(a). (As to these, see the quotation which follows.)

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Before I embark on an analysis of Lord Diplock's argument, on your Lordships' attitude to which, substantially, I regard the appellant's case to stand or fall, there are one or two preliminary observations as to the history of the crime of homicide and the language employed in defining them on which I would desire to comment. As I pointed out in *Hyam* (2) the expression 'malice aforethought', in whatever tongue expressed,

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is unfortunate since neither the word 'malice' nor the word 'aforethought' is construed in its ordinary sense. In construing the word 'aforethought' as intention to kill or, if Lord Diplock's dissenting opinion be followed, to endanger life, however lacking in premeditation, is admittedly enough to constitute the mens rea in murder in the absence of the availability of such mitigating factors as self-defence, provocation, insanity or diminished responsibility, notwithstanding that, five minutes before his act, the killer may have been innocent of any such intention. As regards 'malice', the necessary intention for the purposes of the present appeal is either an intention to kill or endanger life (as Lord Diplock's speech in *Hyam* (2) would have had it) or the intention to kill or cause really serious harm (or the addition to it decided in *Hyam*) as the five-judge Court of Appeal and your Lordships' House have decided it to be in *Vickers* (3), *Smith* (4), and *Hyam* respectively. Each state of mind is something which may exist without the assailant being consciously activated by 'malice' in the popular sense of the word.

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Stephen's Digest of the Criminal Law (9th edn by L. F. Sturge, pp.211-213, art 264) defined 'malice aforethought' as follows:

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Murder is homicide not excused or justified by the exceptions laid down in Chapter XXX, and with malice aforethought as herein-after defined.

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'Malice aforethought means any one or more of the following states of mind preceding or co-existing with the act or omission by which death is caused, and it may exist where that act is unpremeditated. (a) An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (this is the state of mind affirmed in *Vickers* (3)); (b) knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused (this is approximately the state of mind affirmed in *Hyam* (2)); (c) an intent to commit any felony whatever; (or submitted an intent to

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- (2) 138 JP 374; [1975] AC 55
- (3) 121 JP 510 [1957] 2 QB 664
- (4) 124 JP 473; [1961] AC 290

commit any felony of such a kind that the actual commission thereof would involve the use or at least the threat of force against the person killed) (this state of mind was excluded by the Homicide Act, 1967); (d) an intent to oppose by force any officer of justice on his way to, in, or returning from the execution of the duty of arresting, keeping in custody, or imprisoning any person whom he is lawfully entitled to arrest, keep in custody, or imprison, or the duty of keeping the peace or dispersing an unlawful assembly, provided that the offender has notice that the person killed is such an officer so employed (this state of mind too was excluded by the Homicide Act, 1957).'

This definition was the result of a long and careful research into the earlier cases and authors, beginning with Coke and ending with East, as set out at length in Stephen's original Note XIV (now Note VIII in Mr Sturge's edition). It represents the author's view of what the law of murder was independently of the doctrine of 'constructive malice' contained in paras.(c) and (d) of the definition now effectively abolished by the Homicide Act, 1957.

By the time *Vickers* was decided, the terminology of the law thus recognized three classes of malice aforethought as sufficient to constitute the crime of murder, viz 'express', 'implied' and 'constructive' malice, the last mentioned, as I have said, having been abolished by the Homicide Act, 1957, but corresponding to paras.(c) and (d) of Stephen's classification. These last are sometimes labelled 'felony murder' and 'arrest murder'. For myself, as I have observed before (see *Hyam* (2)), I find the terminology inconvenient. I can understand well enough how a contract can be express (when expressed in words oral or written) or implied (e.g. when to be inferred from conduct, from a course of dealing or by necessary implication). I find much greater difficulty in applying this distinction to a state of mind. Since a mental state must necessarily be subjective, there is an argument for saying that all states of mind must be express. Since a mental state can only be inferred, whether from the deeds or words of the subject, or, as Lord Diplock points out in *Hyam* (2) from his own subsequent account of the matter on oath in the witness box, there is an equally strong case for saying that all states of mind must be implied. Nevertheless, though I personally find the terminology misleading and inappropriate, it was expressly recognised by the draftsman of the Homicide Act, 1957, (s.1(1)) as being current law at the time, and by the reinforced Court of Appeal in *Vickers* (3). Despite the summing-up of Hinchcliffe, J., in *Vickers* and the fact (of which I am fairly certain) that the phrase 'implied malice' has not been used consistently at all (Stephen in his History of the Criminal Law uses it at least once in the sense of 'constructive malice'), I was at one time tempted to the view that 'express malice' was originally used to refer to Stephen's para.(a) (the *Vickers* point) and 'implied malice' to Stephen's para.(b) (the *Hyam* point). However in deference

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(3) 121 JP 510; [1957] 2 QB 664

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to the authority of *Vickers* where the phrase is not used in this sense either by the Court of Appeal or by Hinchcliffe, J., I do not now think it safe to express this opinion, attractive as I still find it. Whatever the truth of the matter, the language of decided cases and of s.1(1) of the Homicide Act, 1957, compels one to accept the nomenclature as established legal usage, and to assume a tripartite division between express and implied malice, on the one hand, and constructive malice on the other.

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This brings me to Lord Diplock's dissenting opinion which is really central to the appellant's case. Like myself, he is offended by the express/implied terminology, which is, however, inescapable in discussing the previous learning. For this terminology Lord Diplock substitutes the far more convenient 'actual malice' and 'constructive malice'. I do not myself consider that this innovation, by itself an improvement, necessarily affects the validity, or otherwise, of his argument, though it does enable him to skate over the difficulty created by the express retention by the draftsman of the 'implied' category in s.1(1) of the 1957 Act.

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The real nerve of Lord Diplock's argument, however, does, as it seems to me, depend on the importance to be attached to the passing in 1803 of Lord Ellenborough's Act (43 Geo 3 c 58) by which, for the first time, wounding with the intent to inflict grievous bodily harm became a felony. This, Lord Diplock believes, rendered it possible to apply the doctrine of 'felony murder' as defined in Stephen's category (c), abolished in 1957, to all cases of felonious wounding, where death actually ensued from the wound. The abolition of 'felony murder' in 1957 was thus seen to enable the judiciary to pursue the mental element in murder behind the curtain imposed on it by the combined effect of the statutory crime of felonious wounding and the doctrine of constructive malice, and so to arrive at a position in which the mental element could be redefined in terms either of an intention to kill, or an intention actually to endanger human life, to correspond with the recommendations of the Fourth Report of Her Majesty's Commissioners on Criminal Law (8th March 1839).

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It seems to me, however, that this highly ingenious argument meets with two insuperable difficulties. I accept that it appears to be established that the actual phrase 'grievous bodily harm', if not an actual coinage by Lord Ellenborough's Act, can never be found to have appeared in print before it, though it has subsequently become current coin, and has passed into the general legal jargon of statute law, and the cases decided thereon. But counsel, having diligently carried us through the institutional writers on homicide, starting with Coke, and ending with East, with several citations from the meagre reports available, only succeeded in persuading me at least that, even prior to Lord Ellenborough's Act of 1803, and without the precise label 'grievous bodily harm', the authors and the courts had consistently treated as murder, and therefore unclergible, any killing with intent to do serious harm, however described, to which the label 'grievous bodily harm', as de-

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fined by Viscount Kilmuir LC in *Director of Public Prosecutions v. Smith* (4), reversing the 'murder by pinprick' doctrine arising from *R. v. Ashman* (6), could properly have been applied. It would be tedious to pursue the citations all in detail. We were referred successively to 3 Co Inst 47-52, 1 Hale PC 424-477, 1 Hawk PC 85-88, 4 Bl Com 191-201, Foster's Discourse on Homicide (Crown Law) 255-267 and 1 East PC 103, 214-233. But the further we went into these passages the more hopeless appeared to be the view that, irrespective of constructive malice, malice aforethought had ever been limited to the intention to kill or endanger life. On the contrary, these authorities reinforced the conclusion arrived at by Stephen's original Note XIV (in the Sturge edition Note VIII). This is the more striking in that the last few lines of the note demonstrate clearly that the possible combined effect of the felony-murder rule and the existence of a statutory crime of felonious wounding was consciously present to the author's mind.

There is a second difficulty in the way of treating Lord Ellenborough's Act as providing the kind of historical watershed demanded by Lord Diplock's speech and contended for in the instant appeal by the appellant's counsel. This consists in the fact that, though the nineteenth century judges might in theory have employed the felony-murder rule to apply to cases where death ensued in the course of a felonious wounding, they do not appear to have done so in fact. No case was cited where they did so. On the contrary, there appears to be no historical discontinuity between criminal jurisprudence before and after 1803. Stephen never so treated the matter (either in his text, or, except in the last few lines, in his Note XIV). It was not so treated in the Australian case of *La Fontaine v. R.* (7) (after Hyam (2), but in a jurisdiction in which the constructive malice rule still applied). It was pointed out by counsel for the Crown that the relevant felony created by Lord Ellenborough's Act was limited to cutting or stabbing and did not extend, for example, to beating, which would effectively have excluded the felony-murder doctrine from many cases where death ensued from an act intended to inflict grievous bodily harm. For myself, I think that there is a logical difficulty not based on this narrow point of construction, which prevented the judges from adopting the principle. Felonious wounding intrinsically involves proof by the prosecution of the requisite intention and therefore gives no added force to the earlier law, if I have correctly interpreted the learning before 1803. The way is thus clear on any view to accept as decisive what I myself had always understood to be the law prior to 1957. This is contained in the statement of Lord Goddard CJ representing the court of five judges in *Vickers* (3):

- (2) 138 JP 374; [1975] AC 55
- (3) 121 JP 510; [1957] 2 QB 664
- (4) 124 JP 473; [1961] AC 290
- (6) (1858) 1 F & F 88
- (7) (1976) 1 30 CLR 72 (Australia)

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'Murder is, of course, killing with malice aforethought, but "malice aforethought" is a term of art. It has always been defined in English law as either an express intention to kill, as could be inferred when a person, having uttered threats against another, produced a lethal weapon and used it on a victim, or implied where, by a voluntary act, the accused intended to cause grievous bodily harm to the victim, and the victim died as the result.'

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I should, however, make at least a passing reference to the valid observation made by Lord Diplock in *Hyam* (2) where he points out that, at one point in his History, Stephen appears to treat his draft code (which clearly would have supported Lord Diplock's formulation) as 'exactly corresponding' with his formulation in the Digest (which it clearly does not). As to this, I can only say, on this point, Stephen was surely in error. The two documents do not 'exactly correspond'.

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Counsel for the appellant used one further ground, not found in Lord Diplock's opinion, for supporting the minority view in *Hyam*, (2). This was the difficulty which, as he suggested, a jury would find in deciding what amounted to an intention to inflict 'grievous bodily harm' or 'really serious bodily harm' as formulated in *Smith* (4). I do not find this argument convincing. For much more than a hundred years juries have constantly been required to arrive at the answer to precisely this question in cases falling short of murder (e.g. the s.18 cases). I cannot see that the fact that death ensues should render the identical question particularly anomalous, or its answer, though admittedly more important, any more difficult. Nor am I persuaded that a reformulation of murder so as to confine the mens rea to an intention to endanger life instead of an intention to do really serious bodily harm would either improve the clarity of the law or facilitate the task of juries in finding the facts. On the contrary, in cases where death has ensued as the result of the infliction of really serious injuries I can see endless opportunity for fruitless and interminable discussion of the question whether the accused intended to endanger life and thus expose the victim to a probable danger of death, or whether he simply intended to inflict really serious injury.

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I must add one or two words about the arguments presented in the view of the minority in *Hyam* (2). I readily accede to the view that the task of the modern judge in applying the criminal law is rendered more difficult by the paucity of reliable reports of criminal cases prior to the establishment of a proper pyramid of criminal appeals. I also accept the relevance of the fact that prior to *Woolmington v. Director of Public Prosecutions* (8) the burden of proof was erroneously supposed to be on the defence in a number of cases where a voluntary act resulting in death had been proved by the prosecution, and that prior to 1898 criminal courts never had the advantage of the testimony of the accused. I also genuflect before the miracles of modern surgery and medicine,

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(2) 138 JP 374; [1975] AC 55

(4) 124 JP 473; [1961] AC 290

(8) [1935] AC 462

though I express some doubt whether these may not have been offset to some extent by the increased lethal characteristics of modern weaponry (particularly in the fields of automatic weaponry, explosives and poisons), and the assistance to criminality afforded by the automobile, the motorway and international air transport. I also take leave to doubt whether in the case of injuries to the skull in particular or indeed really serious bodily harm in general these advances have made the difference between inflicting serious bodily harm and endangering life sufficiently striking as to justify judicial legislation on the scale proposed. But, more important than all this, I confess that I view with a certain degree of scepticism the opinion expressed in *Hyam* (2) that the age of our ancestors was so much more violent than our own that we can afford to take a different view of 'concepts of what is right and what is wrong that command general acceptance in contemporary society'. In the weeks preceding that in which this appeal came before your Lordships both the Pope and the President of the United States have been shot in cold blood, a circuit judge has been slain, a police officer has given evidence of a deliberate shooting of himself which has confined him to a wheeled chair for life, five soldiers have been blown up on a country road by a mine containing over a thousand pounds of high explosive, the pillion passenger has been torn from the back of a motor bicycle and stabbed to death by total strangers apparently because he was white, and another youth stabbed, perhaps because he was black, petrol bombs and anti-personnel weapons have been thrown in the streets of London and Belfast at the bodies of the security forces, cars have been overturned and set on fire in Brixton and Bristol, and the Press has carried reports that our own Sovereign moves about the streets of her own country protected by bodyguards armed with automatic weapons. If I moved a few months back I could cite the siege of the Iranian embassy and other terrorist sieges where hostages have been taken by armed men, the shooting in the streets of London of foreign refugees at the hand of their political opponents, and many other acts of lawlessness, violence and cruelty. I doubt whether what seemed clear in 1974, when the *Hyam* appeal was heard, would have seemed so obvious seven years later in 1981. Like 'public policy', 'concepts of what is right and what is wrong that command general acceptance in contemporary society' are difficult horses for the judiciary to ride, and, where possible, are arguably best left to the legislature to decide. It must be added that the legislature has been relatively slow to act. Commission after commission, committee after committee have reported both before and after Sir James Stephen's draft Bill was stillborn after examination by a Victorian select committee of the House of Commons in 1874. Few of the recommendations of these successive inquiries have exactly coincided with one another, and fewer still have reached the statute book. One cannot but feel sympathy with Lord Kilbrandon's plea (*Hyam* (2)) for a single, and simplified, law of homicide especially since the death penalty for murder has been abolished. But I venture to think that the problem involves difficulties more serious than is sup-

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posed. Few civilised countries have identical laws on the subject of homicide or apply them in the same way. To name only two broad issues of policy, are we to follow s.5 of the Homicide Act 1957 and categorise certain classes of murder in which the prohibited act is arbitrarily adjudged to be worse than in others? The fate of s.5 after the abolition of the death penalty, and its history before that, do not encourage emulation. Or, are we to follow Lord Kilbrandon's inclination and create a single offence of homicide and recognise that homicides are infinitely variable in heinousness, and that their heinousness depends very largely on their motivation, with the result that the judge should have absolute discretion to impose whatever sentence he considers just from a conditional discharge to life imprisonment? I can see both difficulty and danger in this for the judiciary. After conviction of the new offence of homicide, judges would have to be the judges of fact for themselves, unaided by any precise jury verdict as to the exact facts found or any guidance from the legislature as to the appropriate penalty. I doubt whether in practice they would relish the responsibility with greater enthusiasm than that with which Parliament would be eager to entrust them with it. In the meantime we must administer the law as we consider it to be without either the zeal of the reformer or the unwillingness to admit error which characterises the reactionary. In my opinion, *Vickers* (3) was a correct statement of the law as it was after amendment by the Homicide Act 1957, and in *Smith* (4) and *Hyam* (2) your Lordships were right to indorse *Vickers*.

Having reached this conclusion, I doubt whether I possess moral or intellectual agility to discern exactly what I would have done with regard to the practice direction had I reached an opposite view. But I am impressed by the stance Lord Reid took in *Kneller (Publishing, Printing and Promotions) Ltd. v. Director of Public Prosecutions* (9) where he refused to invoke the practice direction in support of his own previous dissent in *Shaw v. Director of Public Prosecutions* (10) and I am impressed by the arguments of Lord Morris and Lord Simon in the same case in favour of caution. Nor can I disregard the fact that had I reached a different conclusion I should have been saying that between 1957 and the abolition of capital punishment for murder, a number of persons (including Vickers himself (3)) would have been executed when they ought only to have been convicted at common law of manslaughter had the trial judge anticipated my putative decision. Under the express terms of the practice direction stare decisis is still the indispensable foundation of the use by your Lordships of the appellate jurisdiction of the House and its normal practice. Especially must this be so in criminal law, where certainty is indeed a condition of its commanding and retaining respect. In the event, I am spared these conscientious

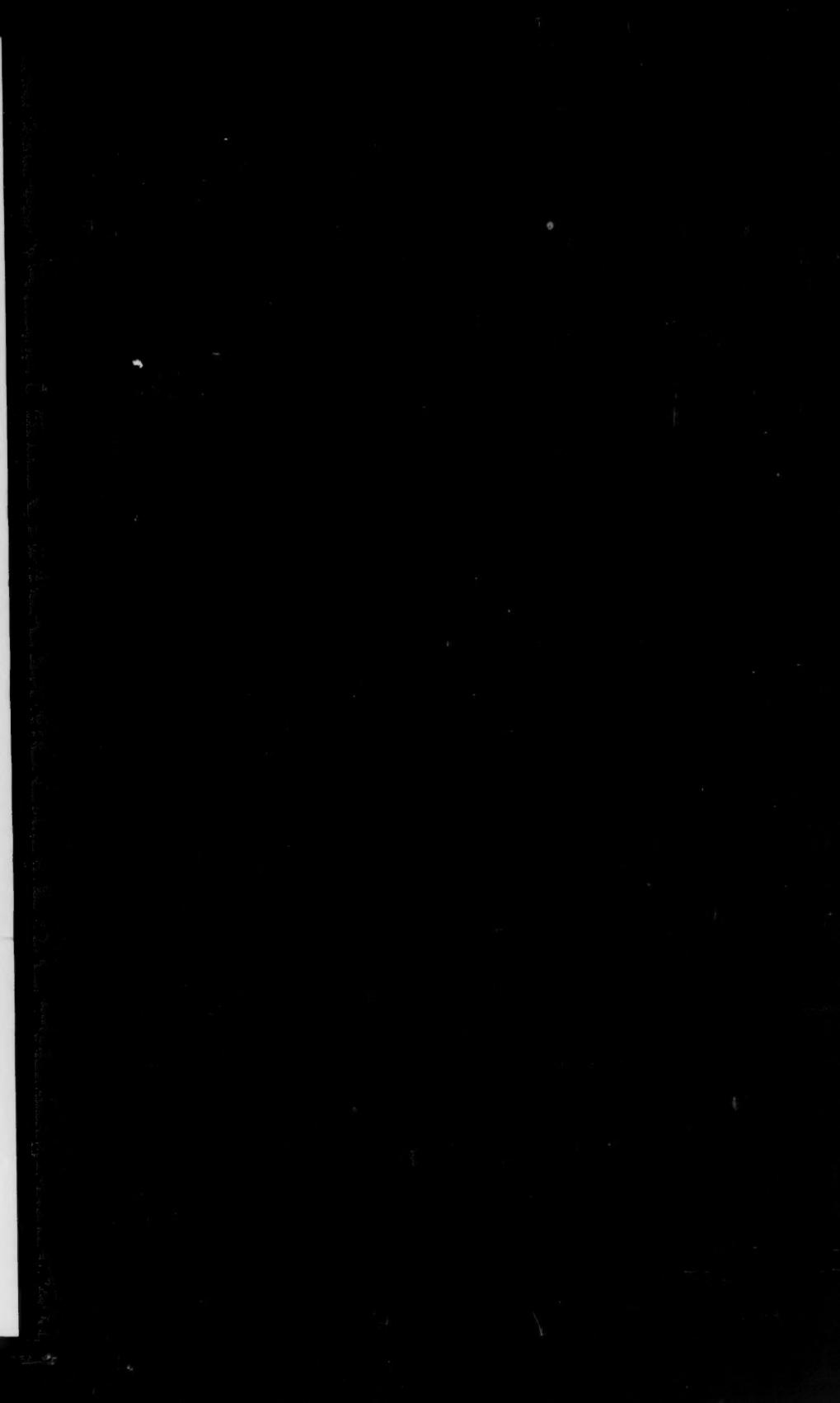
(2) 138 JP 374; [1975] AC 55

(3) 121 JP 510; [1957] 2 QB 664

(4) 124 JP 473; [1961] AC 290

(9) 136 JP 728; [1973] AC 435

(10) 125 JP 437; [1962] AC 220





difficulties, and, without refusing to invoke the practice direction, I am able to say with sincerity that, on the law as it is, and on its merits, the appeal should be dismissed.

LORD WILBERFORCE: I have had the privilege of reading in advance the speech delivered by Lord Hailsham. I agree entirely with it.

I wish to add to what the noble and learned Lord has said my firm recognition of the value of his opinion with reference to the issue now relevant, in *Hyam v. Director of Public Prosecutions* (2). Taken together with *R. v. Vickers* (3) and the indorsement of that case by this House in *Director of Public Prosecutions v. Smith* (4), with the history of the development of the law relating to murder over nearly four hundred years, and with the authority of Stephen, this makes the case for the minority opinions in *Hyam* (2) as statements de lege lata, with respect, unarguable at the present time. And, furthermore, if it were possible for this House, judicially, to change the existing law (so as to require an intention to endanger life rather than an intention to do 'grievous bodily harm'), whatever defects the present law may possess, that particular change would in my opinion be for the worse, not for the better, in providing a test both uncertain and practically unworkable. I am happy to see that Lord Hailsham agrees in this. I would dismiss the appeal and answer the certified question in the affirmative.

LORD SIMON OF GLAISDALE: I have had the privilege of reading in draft the speech delivered by my noble and learned friend on the Woolsack. I agree with it; and I would therefore dismiss the appeal.

LORD EDMUND-DAVIES: I gratefully accept everything that Lord Hailsham has propounded in his speech which I have had the advantage of reading in draft, and I venture to add no more than a footnote.

The cases are probably rare where your Lordships' House would think it right to invoke the practice direction on judicial precedent (*Note* [1966] 3 All ER 77, [1966] 1 WLR 1234) notwithstanding the conclusion that a relevant earlier decision had been *correctly* arrived at. But that such a power exists is recognised in the practice direction itself, and *Miliangos v. George Frank (Textiles) Ltd.* (11), is an instance of this House, while not condemning as wrong a decision it had delivered 15 years earlier, declining to follow it on the ground that the instability which had meanwhile overtaken major currencies was such that, in the words of Lord Wilberforce, 'To change the rule would . . . avoid injustice in the present case' (see [1976] AC 443 at 467).

Even where an earlier decision is *not* approved of, the practice

- (2) 138 JP 374; [1975] AC 55
(3) 121 JP 510 [1957] 2 QB 664
(4) 124 JP 473; [1961] AC 290
(11) (1976) AC 443

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direction stresses 'the especial need for certainty as to the criminal law', and in *Kneller (Publishing, Printing and Promotions) Ltd. v. Director of Public Prosecutions* (9) Lord Reid emphasised that

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'our change of practice in no longer regarding previous decisions of this House as absolutely binding does not mean that whenever we think that a previous decision was wrong we should reverse it.'

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The minority dissents of Lord Diplock and Lord Kilbrandon, in *Hyam v. Director of Public Prosecutions* (2) were based on their conclusions that the law as to intent in murder had been incorrectly stated by this House in *Director of Public Prosecutions v. Smith* (4) and that exposure of the error should lead to a quashing of Hyam's conviction for murder. In the present case, on the other hand, your Lordships have unanimously concluded and now reiterate that the law as to murderous intent was correctly stated in *R. v. Vickers* (3). Even so, is now the time and is this House the place to reveal and declare (so as to 'avoid injustice') what *ought* to be the law and, in the light of that revelation, here and now to recant from its former adoption of *Vickers*?

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My Lords, I would give a negative answer to the question. I say this despite the fact that, after much veering of thought over a period of years, the view I presently favour is that there should be no conviction for murder unless an intent to kill is established, the wide range of punishment for manslaughter being fully adequate to deal with all less heinous forms of homicide. I find it passing strange that a person can be convicted of murder if death results from, say, his intentionally breaking another's arm, an action which, while undoubtedly involving the infliction of 'really serious harm' and, as such, calling for severe punishment, would in most cases be unlikely to kill. And yet, for the lesser offence of attempted murder, nothing less than an intent to kill will suffice. But I recognise the force of the contrary view that the outcome of intentionally inflicting serious harm can be so unpredictable that anyone prepared to act so wickedly has little ground for complaint if, where death results, he is convicted and punished as severely as one who intended to kill.

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So there are forceful arguments both ways. And they are arguments of the greatest public consequence, particularly in these turbulent days when, as Lord Hailsham has vividly reminded us, violent crimes have become commonplace. Resolution of that conflict cannot, in my judgment, be a matter for your Lordships' House alone. It is a task for none other than Parliament, as the constitutional organ best fitted to weigh the relevant and opposing factors. Its solution has already been attempted extra-judicially on many occasions, but with no real success. My Lords, we can do none other than wait to see what will emerge when the task is undertaken by the legislature, as I believe it should be when the time is opportune.

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- (2) 138 JP 374; [1975] AC 55
(3) 121 JP 510; [1957] 2 QB 664
(4) 124 JP 473; [1961] AC 290
(9) 136 JP 728; [1973] AC 435

Be that as it may, in respectful and complete concurrence with the Lord Chancellor, I hold that the direction of Lawson, J., in the present case was impeccable and I would therefore dismiss the appeal.

LORD BRIDGE OF HARWICH: I have had the advantage of reading in draft the speech of my noble and learned friend on the Woolsack. I respectfully and unreservedly agree with it. Accordingly I would answer the certified question in the affirmative and dismiss the appeal.

Solicitors: *Boxall & Boxall for Godfrey Davis & Waitt, Ramsgate; Director of Public Prosecutions.*

Reported by G.F.L.Bridgman, Esq., Barrister.

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HOUSE OF LORDS

(Lord Diplock, Lord Fraser of Tullybelton, Lord Russell of Killowen,
Lord Keith of Kinkel and Lord Roskill)

June 25, 1981

R. v. BROPHY

Criminal Law – Trial – Evidence – *Voir dire* – Defendant's evidence
relevant to issue at *voire dire* – Admissibility at substantive trial

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The respondent was tried in Northern Ireland by a judge sitting without a jury on an indictment containing 49 counts. There was no evidence against him on the first 48 counts except that of statements, written or oral, which he had made or was alleged to have made to the police. After a *voire dire* the judge stated that he was not satisfied that the respondent had not been induced to make these statements by his being subjected to torture or to inhuman or degrading treatment while in custody. Consequently the first 48 counts were not supported by any evidence and the respondent was acquitted on them. On the 49th count the respondent was charged with being a member of a proscribed organisation, and he admitted that he had been a member of the Irish Republican Army from September, 1971, until December, 1974. When the substantive trial was resumed the evidence given by the respondent at the *voire dire* was proved, and he was convicted on count 49. The Court of Appeal in Northern Ireland allowed an appeal against this conviction on the ground that the respondent's evidence at the *voire dire* was not admissible at the substantive trial. On an appeal by the prosecution to the House of Lords,

Held: (dismissing the appeal): it having been held that the material part of the respondent's evidence at the *voire dire* was relevant to the issue at the *voire dire* a necessary consequence was that it was not admissible at the substantive trial.

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Per Lord Fraser of Tullybelton: If such evidence, being relevant, were admissible at the substantive trial an accused person would not enjoy the complete freedom which he ought to have at the voire dire to contest the admissibility in evidence of his previous statements. It is of the first importance for the administration of justice that an accused person should feel completely free to give evidence at the voire dire of any improper methods by which a confession or admission has been extracted from him, for he can almost never make an effective challenge to its admissibility without giving evidence himself... If his evidence were admissible at the substantive trial the result might be a significant impairment of his so-called "right of silence" at the trial.

Appeal by the Crown against a decision of the Court of Appeal in Northern Ireland.

R.Appleton Q.C., R.D.Carswell Q.C. and M.J.Higgins (Northern Ireland Bar) for the Crown.

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R.Ferguson Q.C. and T.Mooney (Northern Ireland Bar) for the respondent.

25th June, 1981. The following opinions were delivered:

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LORD DIPLOCK: My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Fraser. I agree with it and with the order which he proposes.

LORD FRASER OF TULLYBELTON: This appeal raises a question of importance to the administration of criminal justice, whether admissions made by an accused person in the course of giving evidence at a trial, or voire dire, can be used by the Crown at the substantive trial as evidence tending to prove that he is guilty of the offence charged in the indictment.

The respondent was tried by Kelly, J., sitting without a jury under the Northern Ireland (Emergency Provisions) Act, 1978, on an indictment containing 49 counts. There were twelve counts of murder, arising out of an explosion and fire in which twelve persons were burned to death or suffocated. There were 36 counts of causing explosions or possessing explosives or firearms on various occasions between September, 1976, and February, 1978. Finally there was one count, the 49th, of belonging to a proscribed organisation, namely, the Irish Republican Army ('IRA'), between specified dates in 1976 and 1978. The respondent pleaded not guilty to all the charges. There was no evidence of any kind against him except a number of statements, some written and some oral, which he had made, or was alleged by the Crown to have made, to the police after his arrest. The respondent challenged the admissibility of the statements, under s.8(2) of the 1978 Act, on the ground that he had been induced to make them by being subjected to torture or to inhuman or degrading treatment while in custody. The learned trial judge, after a voire dire, delivered a careful and exhaustive judgment holding that he was not satisfied that the statements had not been so obtained, and he excluded evidence of them from the substantive trial. The first 48 counts were therefore unsupported by any evidence, and on those counts the accused was acquitted.

The instant appeal related only to the 49th count, of belonging to a proscribed organisation. At an early stage of his evidence-in-chief in the voire dire the respondent admitted in terms that he had been a member of the IRA during the greater part of the period charged in count 49. His evidence on this matter could not have been more explicit. In answer to a question from his own counsel whether he had joined any organisation, he replied: 'Yes, I was a member of the IRA'. In answer to the immediately following questions from his counsel he said that he had joined the IRA in September, 1971, and remained a member until December, 1977. When the substantive trial was resumed the Crown called the shorthand writer who had recorded the evidence given at the voire dire to prove the evidence given by the respondent. I pause to notice that this was done, as I understand, to keep the procedure formally the same as it would have been if the judge had been sitting with a jury, but I doubt whether it can have served any practical purpose; the judge had heard the evidence given at the voire dire, and he was himself the sole judge of fact at the substantive trial. In such circumstances, unless the judge wishes to have his recollection of the evidence at the voire dire refreshed, or there is some other practical reason for proving what passed at the voire dire, I do not consider that it is necessary to go through the formal step of proving it to the judge who has already heard it.

Returning to the narrative, when the shorthand writer was called, counsel for the respondent objected to her evidence being admitted, but the judge overruled the objection, the transcript of the evidence at the voire dire was read and the shorthand writer was not cross-examined. The judge considered that the respondent's evidence as to his membership of the IRA was not strictly relevant to the voire dire, and that it was certainly not essential to the central question that had been in dispute at that stage. On that ground he did not regard it as evidence on the question of admissibility of the respondent's statements to the police, and, as it had been freely given during the respondent's examination-in-chief, he held that it was admissible in the substantive trial. On that evidence, which was the only evidence against the respondent, he was convicted on count 49.

The Court of Appeal in Northern Ireland allowed the respondent's appeal against his conviction. They also certified three points of law of general public importance and granted leave to appeal to your Lordships' House. The questions certified by the Court of Appeal are as follows:

- '(1) Whether in a criminal trial, after statements made by the accused have been excluded on the voire dire as inadmissible, the prosecution may adduce in evidence at the substantive trial admissions made by the accused in the course of the voire dire which prove or tend to prove that he is guilty of an offence charged in the indictment; (2) Whether any distinction in this respect should be drawn between admissions elicited by cross-examination and other admissions; (3) Whether there is any difference in this respect between a trial with a jury and a trial by a judge alone.'

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The decision of the Court of Appeal to allow the appeal was made after they had held that the respondent's evidence at the voire dire that he had been a member of the IRA was fully capable of being regarded as relevant to the issue for decision on the voire dire. On that vital matter they differed from the trial judge. That it was vital appears from the statement by Lord Lowry CJ, delivering the judgment of the Court of Appeal, that 'it is only relevant evidence which is protected' against admission at the substantive trial. I am of opinion that the Court of Appeal were clearly right in holding that the evidence was relevant to the issue at the voire dire. The practical question at that stage was whether the respondent had been subjected by the police to inhuman or degrading treatment. The respondent contended that he had, and the police, of course, denied it. In relation to that question, it was in my opinion relevant for him to show, if he could, that he had been a member of the IRA for several years, up till a date less than two months before the date of the murders charged in counts 1 to 12 (17th February, 1978). If, as would be likely, the police knew or suspected this, not only would they be more hostile to him than if had not, but also they would expect him to have received instruction how to avoid succumbing to the normal techniques of interrogation which do not involve any physical ill-treatment. Counsel for the Crown argued that the mere fact that the respondent had been a member of the IRA was not relevant unless the police knew of his membership and he said (rightly) that it had not been proved that the police did know of it. Counsel argued that an essential link in the chain was therefore missing, and that the trial judge had been right in treating the respondent's evidence of membership of the IRA as irrelevant. I cannot agree. The argument depends, in my opinion, on taking altogether too narrow a view of the matter. If the respondent had been a member of the IRA for more than six years, as he had admitted, I think it is reasonable to assume that the police would probably have been aware of the fact.

I would rest my opinion of relevance also on a wider ground. Where, as in this case, evidence is given at the voire dire by an accused person in answer to questions by his counsel, and without objection by counsel for the Crown, his evidence ought in my opinion to be treated as relevant to the issue at the voire dire, unless it is clearly and obviously irrelevant. The accused should be given the benefit of any reasonable doubt. Of course, if the accused, whether in answer to questions from his own counsel or not, goes out of his way to boast of having committed the crimes with which he is charged, or if he uses the witness box as a platform for a political speech, his evidence so far as it relates to these matters will almost certainly be irrelevant to the issue at the voire dire, and different considerations will apply to its admissibility at the substantive trial. But on any reasonable view of the respondent's evidence in this case it cannot be said to be clearly and obviously irrelevant.

Once it has been held that the material part of the respondent's evidence was relevant to the issue at the voire dire, a necessary consequence is, in my opinion, that it is not admissible in the substantive trial. Indeed counsel for the Crown did not argue to the contrary. If such evidence, being relevant, were admissible at the substantive trial, an accused person would not enjoy the complete freedom that he ought

to have at the voire dire to contest the admissibility of his previous statements. It is of the first importance for the administration of justice that an accused person should feel completely free to give evidence at the voire dire of any improper methods by which a confession or admission has been extracted from him, for he can almost never make an effective challenge of its admissibility without giving evidence himself. He is thus virtually compelled to give evidence at the voire dire, and if his evidence were admissible at the substantive trial, the result might be a significant impairment of his so-called 'right of silence' at the trial. The right means 'No man is to be compelled to incriminate himself; nemo tenetur se ipsum prodere': see *R. v. Sang* (1) per Lord Scarman. The word 'compelled' in that context must, in my opinion, include being put under pressure. So long as that right exists it ought not to be cut down, as it would be if an accused person, who finds himself obliged to give evidence at the voire dire, in order to contest a confession extracted by improper means, and whose evidence tends to show the truth of his confession, were liable to have his evidence used at the substantive trial. He would not receive a fair trial, as that term is understood in all parts of the United Kingdom.

I do not overlook or minimise the risk that accused persons may make false allegations of ill-treatment by the police; some of them undoubtedly do. But the detection of dishonest witnesses on this, as on other matters, is part of the ordinary duty of the courts and it should be left to them. The possibility, indeed the practical certainty, that some accused will give dishonest evidence of ill-treatment does not justify inhibiting their freedom to testify at the voire dire. The importance of the principle was explained by Lord Hailsham in the recent Privy Council case of *Wong Kam-ming v. The Queen* (2):

'any civilised system of criminal jurisprudence must accord to the judiciary some means of excluding confessions or admissions obtained by improper methods. This is not only because of the potential unreliability of such statements, but also, and perhaps mainly, because in a civilised society it is vital that persons in custody or charged with offences should not be subjected to ill treatment or improper pressure in order to extract confessions. It is, therefore, of very great importance that the courts should continue to insist that before extra-judicial statements can be admitted in evidence the prosecution must be made to prove beyond reasonable doubt that the statement was not obtained in a manner which would be reprobated and was therefore in the truest sense voluntary. For this reason it is necessary that the accused should be able and feel free either by his own testimony or by other means to challenge the voluntary character of the tendered statement. If, as happened in the instant appeal, the prosecution were to be permitted to introduce into the trial evidence of the accused given in the course of the voire dire when the statement to which it relates has been excluded, whether in order to supplement the evidence otherwise available as part of the prosecution case, or by way of cross-examination of the accused, the important

(1) 143 JP 606; [1980] AC 402

(2) 143 JP 525; [1980] AC 247

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principles of public policy to which I have referred would certainly become eroded, possibly even to vanishing point.'

Wong Kam-ming v. The Queen (2) differs from the present case in two respects. First, the trial there was by a judge and jury. Second, the accused's admission had been elicited in cross-examination at the voire dire. The decision is therefore not directly in point, but neither of these features was essential to the observations by Lord Hailsham in the passage which I have quoted, which were quite wide enough to apply to the facts of this appeal. In my opinion they are applicable here also.

A submission was made by counsel for the Crown that the position of the accused could be adequately safeguarded if his evidence at the voire dire were admissible at the substantive trial, provided that the judge had a discretion to exclude at the trial any such evidence which would prejudice him unfairly. This was the approach favoured by Bray, C.J., in *R. v. Wright* (3), a South Australian case, the actual decision in which cannot stand with *Wong*, and was not supported by counsel for the Crown in this appeal. With all respect, I cannot regard that as a satisfactory solution. The right of the accused to give evidence at the voire dire without affecting his right to remain silent at the substantive trial is, in my opinion, absolute and is not to be made conditional on an exercise of judicial discretion.

Where an accused has admitted at the voire dire that he is guilty of a charge of such gravity as that in the 49th count in the instant appeal, no court can acquit him without most anxious consideration of the issue involved. The Court of Appeal evidently gave such consideration to the issue here, and I have endeavoured to do the same. Having done so, I feel no doubt that the Court of Appeal reached the right decision and that the respondent must be acquitted.

I would answer all the certified questions in the negative and I would dismiss the appeal.

LORD RUSSELL OF KILLOWEN. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Fraser. I agree with it and with the order that he proposes.

LORD KEITH OF KINKEL. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Fraser. I agree with it, and for the reasons stated by him I too would dismiss the appeal.

LORD ROSKILL. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Fraser. For the reasons he gives, I too would answer all the certified questions in the negative and would dismiss this appeal.

Solicitors: Director of Public Prosecutions, for Director of Public Prosecutions for Northern Ireland; Simons, Muirhead & Allan, for P.J. McGrory, Belfast.

Reported by G.F.L. Bridgman, Esq., Barrister,

(2) 143 JP 525; [1980] AC 247

(3) (1969) SASR 256 (South Australia)





COURT OF APPEAL
(Lord Lane, C.J., Phillips, J., and Drake, J.)
May 7, 1981

A. — G.'s Ref.
(No. 6. of 1980)
Court of Appeal

ATTORNEY-GENERAL'S REFERENCE (NO 6 of 1980)

Criminal Law — Assault — Defence — Fight between two persons — Charge arising out of fight against one person — Consent of other person.

Two young men, who met in a public street and argued, decided to settle the argument then and there by a fight. They exchanged blows with their fists, the respondent causing the other man's nose to bleed and his face to be bruised. The respondent, charged with assault, was acquitted on the ground that the other man had consented to what had occurred. The case was referred to the court by the Attorney-General.

Held: it was not in the public interest that people should cause or try to cause each other actual bodily harm for no good reason; it was immaterial whether the act occurred in private or in public; it was an assault if actual bodily harm was intended and/or caused; where two persons fought it was not a defence to a charge of assault against one of them that the other person had consented to the fighting.

Per Curiam: Nothing which we have said is intended to cast doubt on the accepted legality of properly conducted games and sports, lawful chastisement and correction, reasonable surgical interference, dangerous exhibitions, etc. . . We would not wish our judgment to be the signal for unnecessary prosecutions.

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Reference to the court by the Attorney-General under s.36 of the Criminal Justice Act, 1972.

R. Rougier, Q.C., and R. Inglis for the Attorney-General.
A. Green as amicus curiae

Cur. adv. vult

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Lord Lane, C.J.

7th May, 1981. LORD LANE, C.J., read the following judgment of the court: This is a reference to the court by the Attorney-General under s.36 of the Criminal Justice Act, 1972. The point of law on which the court is asked to give its opinion is as follows:

"Where two persons fight (otherwise than in the course of sport) in a public place can it be a defence for one of those persons to a charge of assault arising out of the fight that the other consented to fight?"

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The facts out of which the reference arises are these. The respondent, aged 18, and a youth, aged 17, met in a public street and argued together. The respondent and the youth decided to settle the argument there and then by a fight. Before the fight the respondent removed his watch and handed it to a bystander for safe keeping and the youth removed his jacket. The respondent and the youth exchanged blows with their fists and the youth sustained a bleeding nose and bruises to his face caused by blows from the respondent.

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Two issues arose at the trial: (i) self-defence and (ii) consent. The judge directed the jury as follows:

'It has been submitted that, if both parties consent to a fight then that fight may be lawful. In that respect I disagree with [counsel for the prosecution's] description of the law. It may well be that a fight on the pavement is a breach of the peace or fighting in public or some other offence but it does not necessarily mean that both parties are guilty of an assault. So that if two people decide to fight it out with their fists, that is not necessarily an assault. If they use weapons or something of that nature, other considerations apply. So you have to consider those two matters in this case. Was [the youth] acting in self-defence? Was this a case of both parties agreeing to fight and using only reasonable force?'

Thus the jury were directed that the respondent would, or might, not be guilty of assault if the victim agreed to fight, and the respondent only used reasonable force. The respondent was acquitted.

Leading counsel who appeared for the Attorney-General at the hearing of the reference submitted that this direction was incorrect, that the answer to the point of law was No, and that if an act (ordinarily constituting an assault) is unlawful per se no amount of consent can render it lawful. Thus an act committed in public might, he submitted, be an assault, even though it would not be if committed in private, since, if committed in public, it would be a breach of the peace and for that reason unlawful.

Counsel appearing as amicus curiae drew the attention of the court to the relevant authorities and textbooks. He pointed out that though the conclusions in the cases are reasonably consistent the reasons for them are not.

For convenience we use the word 'assault' as including 'battery', and adopt the definition of James, J., in *Fagan v. Metropolitan Police Comr.*, (1), namely:

'the actual intended use of unlawful force to another person without his consent',
to which we would respectfully add 'or any other lawful excuse'.

We think that it can be taken as a starting point that it is an essential element of an assault that the act is done contrary to the will and without the consent of the victim; and it is doubtless for this reason that the burden lies on the prosecution to negative consent. Ordinarily, then, if the victim consents, the assailant is not guilty. But the cases show that the courts will make an exception to this principle where the public interest requires: see *R. v. Coney* (2) (the prize-fight case). The eleven judges were of the opinion that a prize-fight is illegal, that all persons aiding and abetting were guilty of assault, and that the consent of the actual fighters was irrelevant. Their reasons varied as follows: Cave, J., that the blow was struck in anger and likely to do corporal

- (1) 133 JP 16; [1969] 1 QB 439
(2) (1882) 46 JP 404; 8 QBD 534

hurt, as opposed to one struck in sport, not intended to cause bodily harm; Mathew, J., the dangerous nature of the proceedings; Stephen, J., what was done was injurious to the public, depending on the degree of force and the place used; Hawkins, J., the likelihood of a breach of the peace, and the degree of force and injury; Lord Coleridge, C.J., breach of the peace and protection of the public.

The judgment in *R. v. Donovan* (3) (beating for the purposes of sexual gratification), the reasoning in which seems to be tautologous, proceeds on a different basis, starting with the proposition that consent is irrelevant if the act complained of is 'unlawful . . . in itself', which it will be if it involves the infliction of bodily harm.

Bearing in mind the various cases and the views of the textbook writers cited to us, and starting with the proposition that ordinarily an act consented to will not constitute an assault, the question is: At what point does the public interest require the court to hold otherwise?

In answering this question the diversity of view expressed in the previous decisions, such as the two cases cited, make some selection and a partly new approach necessary. Accordingly we have not followed the dicta which would make an act (even if consensual) an assault if it occurred in public, on the ground that it constituted a breach of the peace, and was therefore itself unlawful. These dicta reflect the conditions of the times when they were uttered, when there was little by way of an established police force and prize-fights were a source of civil disturbance. Today, with regular policing, conditions are different. Statutory offences, and indeed byelaws, provide a sufficient sanction against true cases of public disorder, as do the common law offences of affray etc. Nor have we followed the Scottish case of *Smart v. HM Advocate* (4) holding the consent of the victim to be irrelevant on a charge of assault, guilt depending on the 'evil intent' of the accused irrespective of the harm done.

The answer to this question, in our judgment, is that it is not in the public interest that people should try to cause or should cause each other actual bodily harm for no good reason. Minor struggles are another matter. So, in our judgment, it is immaterial whether the act occurs in private or in public; it is an assault if actual bodily harm is intended and/or caused. This means that most fights will be unlawful regardless of consent.

Nothing which we have said is intended to cast doubt on the accepted legality of properly conducted games and sports, lawful chastisement or correction, reasonable surgical interference, dangerous exhibitions, etc. These apparent exceptions can be justified as involving the exercise of a legal right, in the case of chastisement or correction, or as needed in the public interest, in the other cases.

Our answer to the point of law is No, but not (as the reference implies) because the fight occurred in a public place, but because, wherever it occurred, the participants would have been guilty of assault (subject to self-defence) if (as we understand was the case) they intended to and/or did cause actual bodily harm.

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(3) 98 JP 409; [1934] 2 KB 498

(4) 1975 ScLT 65

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The point of law referred to us by the Attorney-General has revealed itself as having been the subject of much interesting legal and philosophical debate, but it does not seem that the particular uncertainty enshrined in the reference has caused practical inconvenience in the administration of justice during the last few hundred years. We would not wish our judgment on the point to be the signal for unnecessary prosecutions.

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Solicitors: *Director of Public Prosecutions; Treasury Solicitor.*

Reported by G. F. L. Bridgman, Esq., Barrister

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HOUSE OF LORDS
(Lord Wilberforce, Lord Edmund-Davies, Lord Fraser of Tullybelton,
Lord Keith of Kinkel, and Lord Roskill)
July 28, 1981

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R. v. KELLY AND OTHERS

Criminal Law — Jurisdiction — Offence committed on board foreign ship on high seas — Criminal damage — Merchant Shipping Act, 1894, s.686(1).

iv

On October 12, 1979, at Newcastle-on-Tyne Crown Court the appellants were charged with criminal damage, contrary to s.1(1) of the Criminal Damage Act, 1971, committed in November, 1978, on board a Danish motor vessel when on the high seas. The appellants contended that the alleged offences were not committed within the jurisdiction of the Crown Court, but the judge held that the court possessed the necessary jurisdiction and ordered the trial to proceed. The appellants pleaded guilty and were sentenced, and they appealed against their convictions to the Court of Appeal who dismissed their appeals. On appeal to the House of Lords,

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Held (dismissing the appeals): the Criminal Damage Act, 1971, did not have any extra-territorial effect, but by virtue of s.686(1) of the Merchant Shipping Act, 1894, the Crown Court had jurisdiction to try the appellants for the offences against the Act of 1971 with which they stood charged.

Appeal against a decision of the Criminal Division of the Court of Appeal.

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*R. Stewart QC and S. Rich for the appellants.
D. Robson QC and B. Forster for the Crown.*

Their Lordships took time for consideration.

28th July, 1981. The following opinions were delivered:

LORD WILBERFORCE: My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Roskill, I concur with it and with the answer that he proposes to the certified question. For the reasons given by him I would dismiss these appeals.

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Lord Wilberforce

Lord Edmund-Davies

LORD EDMUND-DAVIES: For the reasons developed in the speech of my noble and learned friend Lord Roskill, which I have had the advantage of reading in draft, I would answer as he does the question of law certified by the Court of Appeal, Criminal Division, and I would accordingly dismiss these appeals.

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LORD FRASER OF TULLYBELTON: I have had the advantage of reading in draft the speech of my noble and learned friend Lord Roskill, and I agree with it and with the answer that he proposes to the certified question. For the reasons given by him I would dismiss these appeals.

Lord Fraser of
Tullybelton

LORD KEITH OF KINKEL: I agree with the speech to be delivered by my noble and learned friend Lord Roskill, which I have had the opportunity of reading in draft, and would accordingly answer the certified question as proposed by him, and dismiss the appeals.

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Lord Keith of Kinkel

LORD ROSKILL: My Lords, on 16th October, 1979, at the Crown Court at Newcastle upon Tyne, all three appellants faced charges of criminal damage committed on board the Danish motor vessel Winston Churchill, when on the high seas in November, 1978, contrary to s.1(1) of the Criminal Damage Act, 1971. The appellants Kelly and Murphy faced one such charge (count 1) and the appellant Avison two charges (counts 2 and 3). Avison also faced two counts of theft but these were not proceeded with and are no longer relevant. Unusually, written demurrers were signed on behalf of all the appellants at the outset of the trial. These averred that the Crown Court ought not to take cognisance of the indictment since the offences there charged were not committed within the jurisdiction of the court. Elaborate legal argument followed over some two days, and on 18th October, 1979, the trial judge, His Honour Judge Stroyan QC, delivered a long and careful judgment overruling the demurrers. He held that the court possessed the requisite jurisdiction and that in those circumstances the trial must proceed.

Lord Roskill

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In those circumstances the appellants pleaded guilty to the three counts I have mentioned. Each was then sentenced to undergo a period of community service and to pay £300 compensation. The appellants thereupon appealed against their several convictions, the issue of law being that previously raised on the demurrers in the Crown Court at Newcastle. The appeal was heard by the Court of Appeal, Criminal Division (Lord Lane CJ, Stocker J., and Glidewell J.). On 24th October, 1980, that court in a judgment prepared by Glidewell, J., dismissed the appeal, but at the request of counsel for the appellants certified the point of law as one of general public importance:

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'Whether the English criminal law, and more particularly the

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Criminal Damage Act, 1971, extends to the acts of British subjects when passengers in foreign ships when on the high seas and whether the English courts have power to try such persons for such acts by virtue of s.686(1) of the Merchant Shipping Act, 1894, or any other rule of law.'

The Court of Appeal, Criminal Division, refused leave to appeal to your Lordships' House but that leave was subsequently granted by this House.

My Lords, as will later emerge, I venture to question whether the formulation of the point of law certified, which appears to have emanated from counsel for the appellants, is susceptible of a monosyllabic answer, whether in the affirmative or the negative. But it is plain enough that the central question intended to be raised by the appeal is whether, by reason of s.686(1) of the Merchant Shipping Act, 1894, the Crown Court had jurisdiction to try the appellants, all British subjects, for the offences charged, since the acts relied on as constituting those offences took place in a foreign ship on the high seas. Leading counsel for the appellants, in his clear and able argument, did not shrink from condemning the behaviour of the appellants on board the Winston Churchill as disgraceful. So it was. But, however unmeritorious their conduct, they must not be allowed to be convicted of the offences charged unless the law of this country clearly provides that in the events in question the Crown Court had jurisdiction to try them.

It is a remarkable fact that it is nearly ninety years since s.686(1) of the 1894 Act first appeared on the statute book, but the arguments presented in the present appeals have never before been advanced. One imagines that in that period there must have been many cases where British subjects have misbehaved on board foreign ships on the high seas and been prosecuted to conviction by virtue of this subsection. Indeed, leading counsel for the Crown told your Lordships that his information was that there had been such cases over the years, heard in magistrates' courts on the north-east, east and south-east coasts of England. Yet the present submissions have never previously been advanced for the purpose of denying jurisdiction in the court before whom the offenders have been brought. Tribute should therefore be paid to the ingenuity of those to whom the possibility of advancing these submissions first occurred, for as the arguments before your Lordships' House developed it became clear that the submissions had considerable force, especially when s.686(1) is looked at historically.

For ease of reference I will set out all those sections of the 1894 Act to which reference was made, as well as s.686(1):

s.511—(1) Where a British or foreign vessel is wrecked, stranded, or in distress at any place on or near the coasts of the United Kingdom, the receiver of wreck for the district in which that place is situate shall, upon being made acquainted with the circumstance, forthwith proceed there, and upon his arrival shall take the command of all persons present and shall assign such duties and give such directions to each person as he thinks fit for the preservation of the vessel and of the lives of the persons belonging to the vessel

(in this Part of this Act referred to as shipwrecked persons) and of the cargo and apparel of the vessel . . .

s.544—(1) Where services are rendered wholly or in part within British waters in saving life from any British or foreign vessel, or elsewhere in saving life from any British vessel, there shall be payable to the salvor by the owner of the vessel, cargo, or apparel saved, a reasonable amount of salvage, to be determined in case of dispute in manner hereinafter mentioned . . .

s.686—(1) Where any person, being a British subject, is charged with having committed any offence on board any British ship on the high seas or in any foreign port or harbour or on board any foreign ship to which he does not belong, or, not being a British subject, is charged with having committed any offence on board any British ship on the high seas, and that person is found within the jurisdiction of any court in Her Majesty's dominions, which would have had cognizance of the offence if it had been committed on board a British ship within the limits of its ordinary jurisdiction, that court shall have jurisdiction to try the offence as if it had been so committed.

s.687 All offences against property or person committed in or at any place either ashore or afloat out of Her Majesty's dominions by any master, seaman, or apprentice who at the time when the offence is committed is, or within three months previously has been, employed in any British ship shall be deemed to be offences of the same nature respectively, and be liable to the same punishment respectively, and be inquired of, heard, tried, determined, and adjudged in the same manner and by the same courts and in the same place as if those offences had been committed within the jurisdiction of the Admiralty . . .

The argument founded on s.686(1) was twofold. First, it was said that the subsection did not in any way extend the ambit of English, or, indeed, Scottish, criminal law: it was not, to borrow the language of counsel for the appellants, an offence-making section. It was concerned only with establishing a venue for the trial of those offenders whose offences committed outside the United Kingdom were otherwise justiciable under the criminal law of England or Scotland. Secondly, it was said that, even if the subsection did have the overall effect contended for by the Crown, the appellants, being passengers in the Winston Churchill, 'belonged' to her and were therefore in any event not within the subsection. The validity of these submissions must depend on the true construction of the subsection.

The argument from the appellants started from the undoubted, and indeed admitted, fact that the Criminal Damage Act, 1971, does not have extra-territorial effect. In other words, a British subject who does an act outside England and Wales, which if done in England and Wales would constitute an offence against that Act, is not liable to prosecution and conviction in England or Wales for that act so done outside. As Professor Glanville Williams QC expresses the point in the first of three valuable articles entitled *Venue and the Ambit of Criminal*

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Law ((1965) 81 LQR 276, 518) criminal jurisdiction is linked with territory. There are, of course, a number of well-known statutory exceptions to this rule, for example, s.9 of the Offences against the Person Act, 1861 (murder or manslaughter by a British subject committed on land outside the United Kingdom) and s.31(1) of the Criminal Justice Act, 1948, (offences by servants of the Crown committed outside the United Kingdom). See also Archbold's Pleading, Evidence and Practice in Criminal Cases (40th edn, 1979, §§192–204). But, so the appellants' submissions ran, the basic rule is clear and s.686(1) of the 1894 Act does not on its true construction render a British subject who does an act of criminal damage in a foreign vessel on the high seas liable to prosecution and conviction in England for an offence against the Criminal Damage Act, 1971, since it is conceded that that Act has no extra-territorial effect. Section 686(1) must, therefore, be construed as concerned only with venue for the trial of those offences committed abroad which are otherwise justiciable here.

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My Lords, I propose first to examine these submissions by reference only to the language of the subsection and without regard to its genealogy, for it is common ground that the subsection, though also in part reproducing s.21 of the Merchant Shipping Act Amendment Act, 1855, and s.11 of the Merchant Shipping Act, 1867, introduced additional provisions beyond those previously on the statute book. In passing I note that it appears to be the curious fact that these two last-mentioned sections, though seemingly overlapping, remained concurrently in force until repealed by sched. 22 to the 1894 Act.

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Section 686(1) of the 1894 Act is directed to two classes of person. First, British subjects and, second, non-British subjects. It is directed to those British subjects who commit offences, which I take to mean who do acts which, if done in England and Wales or Scotland, would be offences against the respective criminal law of those countries, either on board a British ship on the high seas or in any foreign port or harbour or on board any foreign ship to which they do not belong. It is further directed to non-British subjects who commit offences on a British ship on the high seas. The subsection then provides that, if any such person (be he British subject or non-British subject) is found within the jurisdiction of any court in any of Her Majesty's dominions which would have had jurisdiction to try that person for that offence if committed on board a British ship 'within the limits of its ordinary jurisdiction', that court shall have the jurisdiction to try the offences in question 'as if it had been so committed', that is to say committed on board a British ship within the limits of the ordinary jurisdiction of that court.

iv

Your Lordships' House is presently only concerned with that part of the subsection which affects British subjects in foreign ships. In the second of the articles to which I have already referred (81 LQR 395 at 411) Professor Glanville Williams asks:

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'Was this section intended to extend the English law of indictable offences *generally* to British subjects travelling on foreign ships, or was it intended merely as a venue provision applicable only where such British travellers were otherwise subject to the law . . . ?'



The learned author gives as an illustration of the latter situation what might be regarded as the somewhat improbable example of bigamy committed by a British subject on a foreign ship.

If the construction contended for by the appellants be correct, and the subsection be construed as concerned only with venue, its practical effect would be negligible. I, therefore, ask why in order to achieve so little so drastic an alteration was made to the law in 1894. Pressed to say what disciplinary control there could be over miscreant British subjects on board foreign ships were his submission to be correct, counsel for the appellants was constrained to say that their offences would fall to be dealt with by the courts of the country to which the vessel belonged in accordance with the law of the vessel's flag. But this is hardly a satisfactory form of control of miscreants returning to the United Kingdom in a foreign ship, and were the flag to be one of what is today called 'convenience' the power of control and punishment would be likely, in most cases, to be for all practical purposes non-existent.

My Lords, I find it difficult to believe that Parliament in 1894 can have intended this result. It seems infinitely more likely that the underlying intention was to enable miscreant British subjects in foreign ships to be dealt with in the courts of the place where they were 'found', the offending acts which they had done outside the jurisdiction being treated as offences committed within the jurisdiction of the court where these persons were found. It is, as I think, the reiterated emphasis in the subsection on the word 'offence' which points the way to the correct construction of this subsection. First, regard must be had to the offence with which the offenders are charged, that is to say the acts done on board the foreign ship alleged to constitute the offence. The offenders are then to be tried in the relevant part of the United Kingdom or of other parts of Her Majesty's dominions as if those acts had been committed in a British ship within the limits of the ordinary jurisdiction of the courts within the jurisdiction of which the offenders are found. In my opinion, all the indications are that the intention of the relevant part of the subsection is directed to ensuring that these offenders are swiftly brought to justice wherever they may be found. The subsection, of course, applies equally to Scotland as to England and Wales, though this seemingly was overlooked in argument in the courts below. The Crown would have to show in each case that the acts done constituted an offence against the relevant criminal law, whether of England and Wales or of Scotland as the case might be. I accordingly have reached the same conclusion as the trial judge and the Court of Appeal, Criminal Division, simply as a matter of the construction of the subsection.

But it was argued for the appellants that, if the genealogy of the subsection be examined, its legislative history supports the view for which the appellants contended. Counsel for the appellants helpfully drew your Lordships' attention to a series of statutes beginning with the Offences at Sea Act, 1536, and followed by the Offences at Sea Act 1799, the Admiralty Offences Act, 1844, and the Admiralty Offences (Colonial) Act, 1849. My Lords, I agree that if regard be paid only to these statutes there is much to be said in favour of the view

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that the relevant parts, to which it is not necessary to refer in detail, were concerned only with venue and not with creating offences. But when one comes first to the 1855 and then to the 1867 Acts, it seems to me that a different pattern emerges. Section 21 of the 1855 Act reads thus:

'If any person, being a British subject, charged with having committed any crime or offence on board any British ship on the high seas or in any foreign port or harbour, or if any person, not being a British subject, charged with having committed any crime or offence on board any British ship on the high seas, is found within the jurisdiction of any court of justice in Her Majesty's dominions which would have had cognizance of such crime or offence if committed within the limits of its ordinary jurisdiction, such court shall have jurisdiction to hear and try the case as if such crime or offence had been committed within such limits . . .'

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Section 11 of the 1867 Act provides:

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'If any *British* subject commits any crime or offence on board any *British* ship, or on board any foreign ship to which he does not belong, any court of justice in Her Majesty's dominions, which would have had cognizance of such crime or offence if committed on board a *British* ship within the limits of the ordinary jurisdiction of such a court, shall have jurisdiction to hear and determine the case as if the said crime or offence had been committed as last aforesaid.'

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One thus finds in these two sections indications of a change of policy designed, as I think, to enable persons to be tried in any court in any part of Her Majesty's dominions for offences committed in the several circumstances respectively dealt with in these sections as if those offences had been committed within the jurisdiction of such a court. In 1894 this policy is taken one step further by the provisions enacted in s.686(1). Clearly, this subsection is not confined to offences created by the 1894 Act itself. It is entirely general in character and to my mind was designed, like the two earlier sections to which I have referred, to extend the territorial aspect of the criminal law to the various classes of persons mentioned in this section, including British subjects on foreign ships to which they did not belong.

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Counsel for the appellants also sought support for his submission from s.687 of the 1894 Act. I do not however think that this section sheds any light on the present problem since although it immediately follows s.686 it has a completely different origin: see s.267 of the Merchant Shipping Act 1854.

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I can deal more briefly with the second submission, namely, that the appellants as passengers 'belonged to the ship' and are therefore in any event without the subsection. This argument was founded on the decision in *The Fusilier* (1), a decision on s.458 of the 1854 Act (see now ss.511 and 544 of the 1894 Act). In their context of entitle-

ment of life salvage, the words were construed as including passengers as well as crew, a decision obviously sensible in that context. Counsel for the appellants argued that similar words in the same statute should be given the same meaning, and that, when Parliament in s.686(1) used the phrase 'or on board any foreign ship to which he does not belong' after the decision in *The Fusilier* (1), it must be taken to have intended that the same meaning be given to that phrase as had previously been given to similar words in s.458 of the 1854 Act. In my view this argument is weakened by a number of considerations. First, the context in which the phrase appears in s.686(1) is wholly different from that of the subsection which was construed in *The Fusilier*. Secondly successive editions of Temperley's Merchant Shipping Acts in a note to s.686(1) have questioned, rightly in my view, whether the reasoning in *The Fusilier* has any application to the phrase when used in that subsection. I do not believe that anyone using ordinary language would for one moment describe the appellants 'as belonging' to the Winston Churchill. In my view this submission is unsound and fails. I would only add that with respect I find myself unable to agree with the distinction suggested at the end of the judgment of the Court of Appeal, Criminal Division, between persons not members of the crew who are on board only for the duration of a short voyage and those who are on board for a longer period of time. I do not think that the duration of the stay on board is relevant to this question.

My Lords, I have already said that the certified question does not permit of a simple monosyllabic answer. I would answer it by saying that 'by virtue of s.686(1) of the Merchant Shipping Act, 1894, the Crown Court had jurisdiction to try the appellants for the several offences against the Criminal Damage Act, 1971, with which they stood charged'. I would therefore affirm the convictions of the appellants and dismiss these appeals.

Solicitors: Park Nelson & Doyle Devonshire, for Molyneux, McKeag & Cooper, Gosforth; Colyer-Bristow, for D E Brown, Newcastle upon Tyne.

Reported by G.F.L. Bridgman, Esq., Barrister.

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HOUSE OF LORDS
(Lord Hailsham of St. Marylebone, L.C., Lord Diplock, Lord Keith of
Kinkel, Lord Scarman, and Lord Roskill)
May 14, 1981

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Road Traffic – Breath test – Requirement by police officer that driver provide specimen of breath for breath test – Request lawfully made by police officer – Refusal by driver – Right of police officer to follow driver into his house – Road Traffic Act, 1972 s.8(5).

Informations were preferred by the appellants, police officers, against the respondents charging in each case that the respondent had been guilty of driving a motor vehicle with a blood-alcohol concentration above the prescribed limit contrary to s.6(1) of the Road Traffic Act, 1972. In each case a requirement to undergo a breath test was lawfully made, the police officer making the requirement being lawfully present outside the main door of the respondent's dwelling house while the respondent was standing just inside the door. The respondent heard and understood the requirement, but he refused to comply with it and retreated further into the house. The police officer had no permission to follow him into the house, but he did so, arrested him and took him to a police station. In each case justices dismissed the information on the ground that the arrest of the respondent was unlawful. Appeals by the prosecutors by Case Stated to a Divisional Court were dismissed. On appeals by them to the House of Lords,

Held: (dismissing the appeals): as a matter of general principle the mere conferment by statute of a power to arrest without warrant did not carry with it a power to enter private premises without the permission of the occupier; where Parliament considered it appropriate that a power of arrest without warrant should be reinforced by power to enter private premises it was in the habit of saying so specifically and the omission of any such specific power was deliberate; accordingly, the power to arrest without warrant conferred on a constable by s.8(5) of the Road Traffic Act, 1972, if a person required by him to proved a specimen of breath for a breath test failed to do so did not carry with it any right to enter that person's private dwelling.

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Appeals by Dennis Finnigan and Bruce John Clowser against decisions of Queen's Bench Divisional Courts.

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D.Fennell QC and R.Bell for the appellant Finnigan.
B.Hytnor QC and D.M.Evans for the respondent Sandiford.
D.Fennell QC and R.Carr for the appellant Clowser.
M.Beckman QC and C.Taylor for the respondent Chaplin.

Their Lordships took time for consideration.

14th May, 1981. The following opinions were delivered.

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Lord Hailsham
of St. Marylebone

LORD HAILSHAM OF ST MARYLEBONE, L.C.: My Lords, having read in draft the opinion about to be delivered by my noble and learned friend Lord Keith, I find its reasoning to be unanswerable, and it there-

fore follows that, for the reasons he gives, these two appeals must be dismissed. Whether, from the point of view of policy, the results of these or several of the earlier decisions arrived at by the courts under the peculiar jurisprudence of the breathalyser are desirable in the public interest is something which only Parliament in its legislative capacity can now determine.

In my view, the analysis of the law contained in the speeches in *Morris v. Beardmore* (1) is clearly correct, and I agree with my noble and learned friend that this analysis implies a general principle, and that the exact point in these appeals, although technically left open in *Morris v. Beardmore*, is covered by that principle. The conclusion is therefore inescapable.

LORD DIPLOCK: The reasoning in the speech of my noble and learned friend Lord Keith, which I find unanswerable, leads ineluctably to the conclusion that once again the way in which the 'breathalyser' provisions of the Road Traffic Act, 1972, are drafted has enabled motorists to 'cock a snook' at the law. These provisions, as first enacted in the Road Safety Act, 1967, were controversial. They represented a novel intrusion on the liberty of the motorist to drive a potentially lethal vehicle on a public road when there was a risk that his judgment or co-ordination had been impaired by the alcohol he had consumed, and consequently the means available to a constable to ascertain whether such was the case were hedged around with restrictions. The many loopholes in the law that the ingenuity of defence lawyers has brought to light are, in my view, doing more to bring the criminal law of this country into disrepute than any other legislation. The revision of the 'breathalyser' provisions is under consideration in the Transport Bill now before Parliament. It is for Parliament to make up its mind whether it wants this lamentable state of affairs to continue.

LORD KEITH OF KINKEL: My Lords, these appeals represent a sequel to the decision of this House in *Morris v. Beardmore* (1). It was there held, on a consideration of s.8(2) of the Road Traffic Act, 1972, that Parliament had not thereby authorized a police constable in uniform lawfully to require a person to undergo a breath test in circumstances where the constable was in a position to make the requirement only because he was present, without any right to be so, on premises occupied by the person concerned. Accordingly, a person who refused to comply with a requirement made in such circumstances was not guilty of an offence under s.8(3).

The two instant cases present the common feature that in each of them the requirement to undergo a breath test was lawfully made. In Mr. Sandiford's case it was made under s.8(1) and in Mr. Chaplin's case under s.8(2). The police officer in each case was lawfully present just outside the main door of the defendant's dwelling house, and the defendant was standing just inside the main door. The defendant heard and understood the requirement, but he refused to comply with it and retreated further inside the house. Police officers advanced inside after

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the defendant, although they had no permission to enter the house, arrested him, and took him to a police station. Mr. Sandiford there supplied a specimen of blood which proved positive, and in due course he was charged with a contravention of s.6(1) of the 1972 Act. Mr. Chaplin, having subsequently refused to supply a specimen of blood or urine for a laboratory test, was charged with offences under ss.8(3) and 9(3) of the Act. In each case the justices dismissed the information on the ground that the arrest of the defendant, following his refusal to undergo a breath test, was unlawful. The respective prosecutors appealed by way of Stated Case, and both appeals came before a Divisional Court consisting of Donaldson, LJ, and Bingham, J. As regards Mr. Chaplin's appeal, they held that he should have been convicted of the offence under s.8, in respect that nothing which happened after his failure to comply with the requirement to undergo a breath test invalidated the legality of the requirement, but they dismissed the appeal in respect of the s.9 charge, on the ground that the police officers were trespassing in Mr. Chaplin's house where they arrested him, and that this invalidated all that followed. The court dismissed the appeal in Mr. Sandiford's case for the same reason.

In relation to each appeal the Divisional Court, while refusing leave to the prosecutor to appeal to this House, certified that their decision involved the following point of law of general importance:

'Whether a constable in uniform who is lawfully within the curtilage of a house and at the door of such premises being the home of a person to whom the constable makes a lawful requirement for a specimen of breath pursuant to s.8(1) [s.8(2) in Mr. Chaplin's case] of the Road Traffic Act, 1972, is empowered to enter the said house without invitation and as a trespasser and effect an arrest under s.8(5) Road Traffic Act, 1972, following a failure to provide a specimen of breath.'

In connexion with the appeal in Mr. Chaplin's case the Divisional Court certified a further question relating to the effect, on the legality of the requirement to undergo a breath test, of excessive force employed by the police officers in arresting Mr. Chaplin. In view of the course which the hearing on the main question followed before your Lordships, no argument was advanced on this second question, and it need not be considered.

So the only issue which your Lordships have to decide turns on the proper construction of s.8(5) of the 1972 Act, which provides:

'If a person required by a constable under subs.(1) or (2) above to provide a specimen of breath for a breath test fails to do so and the constable has reasonable cause to suspect him of having alcohol in his body, the constable may arrest him without warrant except while he is at a hospital as a patient.'

The procedures prescribed by s.9 of the Act as regards the making of a requirement to provide a specimen of blood or urine for laboratory test, which, on compliance, may lead to a charge under s.6(1), or, on

non-compliance, to a charge under s.9(3), are applicable only to a person who has been arrested under s.8 (or possibly under s.5(5), relating to driving when unfit to drive through drink or drugs). It follows that, if a person has not been lawfully arrested under the relevant enactment, the s.9 procedures cannot validly be applied to him and the results of the purported application are inept to form the basis of any conviction. Counsel for the appellants, quite rightly, made no attempt to argue the contrary. The question accordingly comes to be whether the power to arrest without warrant conferred by s.8(5) carries with it the power lawfully to enter, by force if need be, the dwelling house of the person whom it is intended to arrest, for the purpose of carrying out that intention.

It may confidently be stated as a matter of general principle that the mere conferment by statute of a power to arrest without warrant in given circumstances does not carry with it any power to enter private premises without the permission of the occupier, forcibly or otherwise. Section 2 of the Criminal Law Act, 1967, creates a category of 'arrestable offences' in respect of which the power of arrest without warrant may be exercised. Such offences are extremely serious, being those punishable by five years' imprisonment on first conviction, and attempts thereof. Subsection (6) specifically provides:

'For the purpose of arresting a person under any power conferred by this section a constable may enter (if need be, by force) and search any place where that person is or where the constable, with reasonable cause, suspects him to be.'

Apart from the category of arrestable offences, there are a considerable number of instances where a specific power of arrest without warrant is conferred in relation to particular statutory offences. In some instances power of entry is also conferred, for example by s.50(2) of the Firearms Act, 1968. In a great many others, no power of entry is conferred. The proper inference, in my opinion, is that, where Parliament considers it appropriate that a power of arrest without warrant should be reinforced by a power to enter private premises, it is in the habit of saying so specifically, and that the omission of any such specific power is deliberate. It would rarely, if ever, be possible to conclude that the power had been conferred by implication. Counsel for the appellants maintained that in the present case such an implication was properly to be drawn from the circumstance that the penalty under s.8(3) for failing to provide a specimen of breath was a minor one compared with that under s.9(3) for failing to provide a specimen of blood or urine, or under s.6(1) in the event of the specimen proving positive. It was therefore to be inferred, so it was argued, that Parliament did not contemplate the possibility of any interruption in the sequence of events from the making of a lawful requirement for a breath test to the formulation of charges under s.6(1) or s.9(3). But that consideration does not offer any sufficient foundation for the implication claimed to be necessary. There can be no question of the legislative scheme being unworkable in its absence. It is also to be observed that, as noticed above, s.9. is tied in with s.5(5) as well as with s.8(5). It would be

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strange if the latter were held to confer power to enter for the purpose of effecting an arrest, but not the former. The proper conclusion, in my opinion, is that Parliament did not intend to confer such power in either case.

This conclusion is consistent with the principle on which the decision in *Morris v. Beardmore* (1) proceeded, namely, that in this particular piece of legislation Parliament cannot be taken to have authorized any further inroads on the rights of individual citizens than it specifically enacted. The conclusion does, however, have a wider significance, in respect that it must be of general application in cases where a statute has conferred a power of arrest without warrant, but no specific power of entry on private premises for the purpose of effecting the arrest. My Lords, for these reasons I would deal with each of these appeals by answering the certified question in the negative and dismissing the appeal.

LORD SCARMAN: I have had the advantage of reading in draft the speech delivered by my noble and learned friend Lord Keith. I agree with it, and would dismiss each appeal. I also agree with his comment that the House's conclusion has a wider significance than the mere interpretation of s.8(5) of the Road Traffic Act, 1972. It is that, as a general rule, the courts will not construe an enactment conferring a power of arrest without warrant as impliedly authorizing a power of entry into private premises for the purpose of effecting the arrest. If it be Parliament's intention to confer a power of entry, the draftsman must ensure that the power is expressly conferred. Parliament is not to be presumed, in absence of express words, so to intend, unless the implication is irresistible, which would be rare indeed.

LORD ROSKILL: I too have had the advantage of reading in draft the speech of my noble and learned friend Lord Keith. For the reasons which are there set out, I agree that these appeals must be dismissed. It would seem that the problems to which the decision of your Lordships' House in *Morris v. Beardmore* (1) and the instant appeals have given rise had not previously been appreciated. I venture to echo the hope that in the light of these decisions the matter may now be reviewed by Parliament.

Solicitors: *Sharpe, Pritchard & Co*, for *E.C. Woodcock*, Chester and *T. Lavelle*, Lewes; *Kenwright & Cox*, for *Blain, Boland & Co*, Ellesmere Port; *David M. Laing & Co*, Brighton.

Reported by G.F.L. Bridgman, Esq., Barrister





QUEEN'S BENCH DIVISION
(Lord Lane, C.J. and Webster, J.)
December 9, 1980

PEDRO v. DISS

Police – Arrest without warrant – Need to ensure that arrested person understood that he was no longer free – Statement of grounds on which person detained – Metropolitan Police Act, 1839, s.66.

i

The respondent, a police constable, saw the appellant, with other youths, near the door of a private house and was suspicious that he might have in his possession property stolen from the building or housebreaking implements. He told him that he wanted to search him and the appellant, after attempting to resist, allowed the search to take place. The respondent found on the appellant two Yale keys on a ring and asked him whether they were the keys of the house. The appellant began to walk off and the respondent took hold of him by the left arm and said: "I want you to come back round to the house". The respondent having led him round the corner of the house asked him: "Do you live here?". The appellant used foul language and then swung backwards with his left arm hitting the respondent in the chest with his elbow. The respondent caught hold of the appellant's clothing and the appellant punched the respondent in the chest with his right hand. He was arrested, and was charged before justices with assaulting the respondent in the execution of his duty. The respondent contended that from the moment when he stepped in front of the appellant until the moment of the assault and subsequent arrest he was acting in the exercise of the powers conferred on him by s.66 of the Metropolitan Police Act, 1839, and, therefore, was acting in the execution of his duty. The justices convicted the appellant who appealed to a Divisional Court of the Queen's Bench Division,

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Held: (allowing the appeal): a police constable carrying out an arrest was under an obligation to ensure that the arrested person understood that he was no longer a free man; an arrest without warrant could only be justified if it was on a charge made known to the person arrested; in the present case there was no finding that the respondent made known to the appellant the fact that he was no longer a free man or informed him of the grounds on which he was being detained.

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Per Curiam: Section 66 of the Act of 1839 confers on constables in the metropolis powers which extend to a not insignificant decree beyond their common law or other statutory powers, and therefore that section is to be strictly construed.

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Case Stated by justices of the East Central Petty Sessional Division of the Inner London Area sitting at Highbury Corner Magistrates' Court.

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*J. Wood and A. Fulford for the appellant.
A. Goddard for the respondent.*

Cur adv vult

9th December, 1980. LORD LANE, C.J., read the following judgment of the court: This is an appeal by way of Case Stated by the justices of the East Central Petty Sessional Division of the Inner London

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Area in respect of an adjudication at the Highbury Corner Magistrates' Court on 28th September, 1979.

On 2nd July, 1979, an information was laid by the respondent, a police constable, that on 1st July, 1979, the appellant had assaulted him in the execution of his duty, contrary to s.51(1) of the Police Act, 1964. The justices found that the appellant had assaulted the respondent. They held that at the time when he was assaulted the respondent was acting in the execution of his duty and they accordingly convicted the appellant who was later fined £50 by different justices. The question for the opinion of this court was whether on the facts found by the justices they were correct in holding that the respondent was acting in the execution of his duty at the time when he was assaulted. The facts found can be quite shortly stated.

On Sunday, 1st July, 1979, at about 12.45 am, the respondent was in plain clothes as a passenger in a marked police vehicle with two other officers travelling south in Holloway Road. As the officers passed the junction with Fairmead Road on their right, the respondent saw by the first door on the right in Fairmead Road, which was the door to a private residence, three youths, one of whom was the appellant, who appeared to the respondent to be loitering around the doorway. The police vehicle was turned round and driven back towards Fairmead Road in a northerly direction. The police officers got out of the vehicle and the respondent went up the appellant, identifying himself as a police officer, and said: 'What were you doing by that door?' The appellant began to walk away from the respondent who stepped in front of him, and said: 'Do you live there?' The appellant replied: 'I'm not talking to you, man.' The respondent was suspicious that the appellant might have on him property stolen from the building or housebreaking implements and decided to search him. He said: 'I want to search you.' The appellant replied: 'You are not touching me.' The respondent searched the appellant who at first attempted to resist but then allowed the search. The respondent found on the appellant two Yale keys on a ring and said: 'Are these the keys to the house?' The appellant again began to walk off and the respondent took hold of him by the left arm and said: 'I want you to come back round the corner to the house.' The appellant attempted to pull away but the respondent led him round to the side of the house and said: 'Do you live here?' The appellant used foul language and then swung backwards with his left arm hitting the respondent in the chest with his elbow. As he did this the respondent caught hold of the appellant's clothing and the appellant punched the respondent in the chest with his right hand and attempted to get away. The appellant was then restrained with the assistance of the two other officers. The appellant was arrested and cautioned and made no reply. It was later established that the appellant's brother lived at the address.

The question asked by the justices which we have to decide, namely, whether the respondent was acting in the execution of his duty at the time when he was assaulted, can be answered conclusively by reference to a decision of this court in *Ludlow v. Burgess* (1) unless that case can

be distinguished. In that case three youths, including the defendant, were charged with assaulting a constable in the execution of his duty, contrary to s.51 of the Police Act, 1964. The justices found that the constable was kicked in the shin while he was boarding a bus by one of the youths. He had reason to believe it was deliberate, but the defendant claimed it was an accident and expressed his opinion in strong language. The constable, who did not have his warrant card with him, told him to stop using foul language and informed him that he was a police officer. As the defendant started to walk away, the constable put his hand on his shoulder, not with the intention of arresting the defendant, but to detain him for further conversation and inquiries, and the defendant struggled and kicked the constable. The two other youths then assaulted the constable. The justices rejected a submission by the youths that there was no case to answer and convicted them. The youths appealed. The Divisional Court, allowing their appeal, held that the detention of a man against his will without arresting him was an unlawful act and a serious interference with a citizen's liberty. Since it was an unlawful act it was not an act done in the execution of the constable's duty.

The facts of this case are so strikingly similar to the facts in *Ludlow's* case (1) that the decision in that case, unless it can be distinguished, would compel us to the conclusion that the respondent was not acting in the execution of his duty when, as the appellant began to walk off for the second time, the respondent took hold of him by the left arm and, as the appellant attempted to pull away, led him round to the side of the house. That action on the part of the respondent carried out, as the justices found, before he arrested the appellant was a detention by the appellant against his will without arresting him of the same nature in similar circumstances as the detention in *Ludlow's* case (1), so that when, thereafter and before he was arrested, the appellant assaulted the respondent, we would be constrained by that decision to decide that the respondent was not acting in the course of his duty, even if we were to be in some doubt about the matter which in fact we are not. But the respondent seeks to distinguish the present case from that of *Ludlow's* case (1) in reliance on the provisions of s.66 of the Metropolitan Police Act, 1839. That section provides:

'Any person found committing any offence punishable either upon indictment or as a misdemeanor upon summary conviction, by virtue of this Act, may be taken into custody without a warrant by any constable, or may be apprehended by the owner of the property on or with respect to which the offence shall be committed, or by his servant or any person authorised by him, and may be detained until he can be delivered into the custody of a constable to be dealt with according to the law; and every such constable may also stop, search and detain any vessel, boat, cart or carriage in or upon which there shall be reason to suspect that anything stolen or unlawfully obtained may be found, and also any person who

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may be reasonably suspected of having or conveying in any manner anything stolen or unlawfully obtained.'

Section 24 of the Metropolitan Police Courts Act, 1839, contained the following provisions:

- i 'Every person who shall be brought before any of the said magistrates charged with having in his possession or conveying in any manner anything which may be reasonably suspected of being stolen or unlawfully obtained, and who shall not give an account to the satisfaction of such magistrate how he came by the same, shall be deemed guilty of a misdemeanor, and shall be liable to a penalty of not more than five pounds, or, in the discretion of the magistrate, may be imprisoned in any gaol or house of correction within the metropolitan police district, with or without hard labour, for any time not exceeding two calendar months.'
- ii Section 55 of the Metropolitan Police Courts Act provided that that Act and the Metropolitan Police Act should be construed together as one Act, and there can be little doubt, therefore, but that the purpose of the power of detention conferred by s.66 of the Metropolitan Police Act, 1839, in the context of s.24 of the Metropolitan Police Courts Act, 1839, was to enable a police constable in the metropolis, when he had stopped or searched a person whom he reasonably suspected of having or conveying in any manner anything stolen or unlawfully obtained, to bring that person before a magistrate so that he could be charged under s.24 of the Metropolitan Police Courts Act. While s.24 was in force, therefore, it would probably have been unnecessary to decide whether the detention in question was synonymous with an arrest, or whether it included a detention which fell short of a formal arrest.
- iii But s.24 of the Metropolitan Police Courts Act, 1839, was repealed by the Criminal Law Act 1977. Section 66 of the 1839 Act now stands, for practical purposes, on its own and it may now in certain circumstances be necessary to decide what is meant by the word 'detain' in that section. This court has been asked to decide that question, and under what circumstances, after a person has been stopped and searched, the power of detain arises. For it is said on behalf of the respondent that from the moment when he stepped in front of the appellant until the moment of the assault and subsequent arrest he, the respondent was acting in exercise of his duty. The respondent was a police constable of the metropolis ('such constable' within the meaning of the section); as the justices found he suspected that the appellant might have on him stolen property and, by inference from the facts, that suspicion was reasonable; he stopped the appellant and searched him; and, so it was contended, when he took hold of the appellant's left arm he was detaining him within the meaning of s.66 in circumstances which gave him a power to do so. In our view, however, in the circumstances of this case it is not necessary for us to decide whether that last contention was correct because, in our judgment, the respondent is unable to rely on the detention as a detention under that

section, whatever such a detention means or comprehends, for the following reason.

In *R. v. Inwood* (2) the Court of Appeal held that a police constable carrying out an arrest was under an obligation to ensure that the arrested person understood that he was no longer a free man and that, where there was a dispute whether such a person was aware that he had been arrested, the question was one of fact for the jury; and in *Christie v. Leachinsky* (3) the House of Lords held that, apart from special circumstances, which in our view do not exist in the present case, an arrest without warrant can be justified only if it is an arrest on a charge made known to the person arrested.

In our view, whatever be the meaning of the word 'detention' in s.66 of the 1839 Act, the principle of those two decisions must apply just as much to a detention under that section as to an ordinary arrest. Thus a police constable, if he is to rely on the detention as a detention under that section, must in one way or another make it known to the person detained that he is no longer a free man and the grounds on which he is being detained. Here there is no finding that the respondent, at any stage before the arrest which occurred after the assault, made known to the appellant the fact that he was no longer a free man (although such a finding might possibly be inferred from the words, 'I want you to come back around the corner to the house' after he took hold of the appellant by the arm); and there is no finding, not even any suggestion arising by inference out of the findings, that the respondent made known to the appellant the grounds on which he was being detained. Quite apart from the findings, it seems virtually certain that he did no such thing, because we were told in argument that his powers of detention under s.66, whatever precisely they may be, first occurred to anyone connected with this case only after the hearing before the justices.

Accordingly, in our judgment, the respondent cannot rely on the detention in fact as a detention in law under s.66 of the 1839 Act, so that, for the reasons that we have already given and in accordance with the decision in *Ludlow's case* (1) in our judgment he was not acting in the execution of his duty when the appellant assaulted him.

In these circumstances it is unnecessary for us to decide a number of other issues raised in argument, for instance whether the stopping of the appellant before he was searched or the search itself on the facts found were lawful, either by virtue of the respondent's powers under s.66 or by virtue of any other powers. But there are two general observations which we should make.

Firstly, s.66 of the 1839 Act confers on police constables in the metropolis powers which extend, to a not insignificant degree, beyond their common law or other statutory powers. In our view, therefore, that section is to be strictly construed.

Secondly, compliance with the requirements of a lawful arrest in accordance with the decisions of *R. v. Inwood* (2) and *Christie v.*

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- (1) [1971] Crim LR 238
(2) 137 JP 559; [1978] 2 All ER 645
(3) 111 JP 224; [1947] AC 573

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Leachinsky (3) and with the requirements of a lawful detention if in any respect it differs from a lawful arrest is not a mere formality. As this court decided in *Kenlin v. Gardiner* (4), a person who is being lawfully arrested by a police officer or, it follows from our judgment, a person who is being lawfully detained, may not rely on the justification of self-defence if he assaults the police officer in order to resist or escape arrest or detention, but a person who is not being lawfully arrested, or formally and lawfully detained, may do so. This distinction, although a matter of law, is a distinction of which, we suspect, most people are aware. It is a matter of importance, therefore, to a person at the moment when he is first physically detained by a police officer, to know whether that physical detention is or is not regarded by that officer as a formal arrest or detention. That is one of the reasons why it is a matter of importance that the arresting or detaining officer should make known to the person in question the fact that, and the grounds on which, he is being arrested or detained.

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In our judgment, therefore, this appeal should be allowed, the conviction must be quashed and the fine remitted.

Solicitors: *Bindman & Partners; R.E.T. Birch.*

Reported by G.F.L. Bridgman, Barrister.

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(3) 111 JP 224; [1947] AC 573

(4) 131 JP 91; [1966] 3 All ER 931

COURT OF APPEAL
(Watkins, L.J., Cantley, J., and Hollings, J.)
March 6, 1981

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Road Traffic – Breath test – Purpose of test – Ascertainment of proportion of alcohol in person's blood – Need for person providing specimen of breath to do so in sufficient quantity to enable test to be carried out – Absence of requirement that test be carried out with perfect compliance with Alcotest makers' instructions – Road Traffic Act, 1972, s.12(1)(3).

A police constable while driving a motor car along a road saw a car in front of him being driven by the appellant in an erratic manner. He drew alongside the car and caused him to stop. The appellant appeared to be under the influence of alcohol and the constable arrested him pursuant to s.5(5) of the Road Traffic Act, 1972, and took him to a police station where he agreed to provide a specimen of breath for a breath test. The Alcotest equipment was assembled and the appellant was told, in accordance with the manufacturers' instructions, to inflate the bag in one breath. The appellant then provided ten short puffs of breath, fully inflating the bag, and the result was negative. The inspector conducting the test did not regard this as a proper test and he gave the appellant further opportunities to provide a proper sample of breath for the purpose of s.8 of the Act. On the second, third and fourth attempts the appellant gave eight, seven and five puffs of breath, the Alcotest bag not being fully inflated at any attempt. The inspector decided that the appellant had failed to provide a proper specimen of breath and he accordingly required him under s.9 of the Act to provide a specimen of blood or urine for a laboratory test. The appellant supplied a specimen of blood which subsequent analysis showed contained alcohol above the legal limit. The appellant being charged in the Crown Court with driving a car when he had blood-alcohol concentration above the prescribed limit contrary to s.6(1) of the Act, it was submitted on his behalf that he had not failed to provide a proper specimen of breath and the specimen which he had provided had not indicated that the proportion of alcohol in his blood exceeded the prescribed limit. The judge ruled that the appellant had failed to provide a proper specimen for a breath test and that the evidence of the analysis of the blood test was admissible. The appellant appealed on the ground that the judge's ruling was wrong.

Held (dismissing the appeal): guidance as to the true meaning of a breath test in the Act of 1972 was provided by s.12(1) where a breath test was stated to mean a test for the purpose of obtaining an indication of the proportion of alcohol in a person's blood, and by s.12(3) which provided that a specimen of breath for a test meant a specimen in sufficient quantity to enable the test to be carried out; there was in the Act no requirement, express or implied, that a test to be a "breath test" within the Act must be carried out in perfect compliance with the manufacturers' instructions; to hold that the negative specimen of breath provided in the way in which it was by the appellant constituted a "specimen of breath for a breath test" would be to ignore the declared purpose which was part of the definition of "breath test" in s.12(1).

Appeal by Ronald Arthur Littell against his conviction at the Crown Court at Chelmsford for driving a motor vehicle on a road with blood-alcohol concentration above the prescribed limit contrary to s.6(1) of the Road Traffic Act, 1972.

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The appellant in person.

J. Phillips for the Crown.

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6th March, 1981, CANTLEY, J., read the following judgment of the court: This appeal directly raises for decision yet another entirely technical point in the lamentable jurisprudence of the breathalyser law.

Section 5(1) of the Road Traffic Act, 1972, provides that a person who when driving a motor vehicle on a road or other public place is unfit through drink or drugs shall be guilty of an offence. Section 5(5)

provides that a constable may arrest without warrant a person committing an offence under this section. Section 8(7) provides that a person arrested under s.5(5) shall while at a police station be given an opportunity to provide a specimen of breath for a breath test there. Section 9 (1) provides that a person who has been arrested under s.5(5) may while at a police station be required by a constable to provide a specimen for a laboratory test (which may be a specimen of blood or urine) if he has previously been given an opportunity to provide a specimen of breath for a breath test at that station under s.8(7) and either (a) it appears to a constable in consequence of the breath test that the device by means of which the test is carried out indicates that the proportion of alcohol in his blood exceeds the prescribed limit, or (b) when given the opportunity to provide that specimen he fails to do so. Section 12(1) states that a breath test means a test for the purpose of obtaining an indication of the proportion of alcohol in a person's blood, carried out by means of a device of a type approved for the purpose of such a test by the Secretary of State, on a specimen of breath provided by that person. Section 12(3) provides that references in ss.8 and 9 of the 1972 Act to providing a specimen of breath for a breath test are

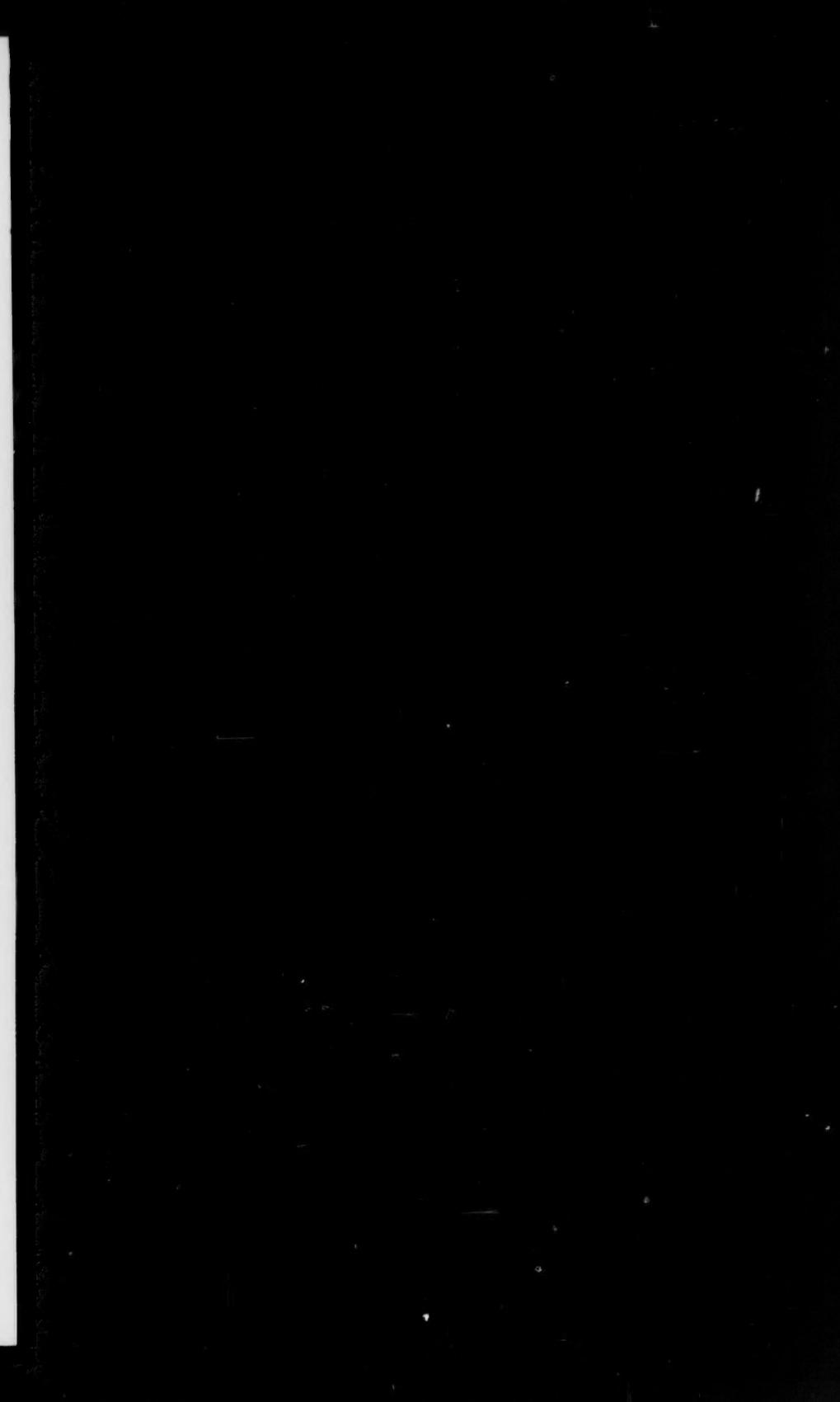
'references to providing a specimen thereof in sufficient quantity to enable that test to be carried out'.

On the evening of 20th January, 1978, a police constable off duty and in plain clothes was driving his motor car along Barking Road, London E6 when he noticed a motor car ahead of him being driven in a markedly erratic manner. He drew alongside, caused the driver to stop and showed him his warrant card. The driver was the appellant. He smelled of drink, was unsteady, and appeared to be under the influence of alcohol. The constable arrested him pursuant to the provision of s.5(5) of the 1972 Act as being unfit to drive through drink or drugs and the appellant was taken to Barking Police Station. At the police station the appellant, as is required by s.8(7), was given an opportunity to provide a specimen of breath for a breath test and agreed to do so. The official Alcotest equipment was duly assembled and the appellant was told, in accordance with the manufacturers' instructions issued with the equipment, to inflate the bag in one breath in not less than 10 or more than 20 seconds. It was emphasized that the bag had to be inflated in one breath. The appellant then took ten short puffs of breath and fully inflated the bag. The result was negative; it did not indicate alcohol above the prescribed limit. The inspector did not regard this as a proper test. He gave the appellant further opportunities. On the second attempt the appellant took eight short puffs. The bag was not

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fully inflated. At the third attempt the appellant took seven short puffs and at the fourth attempt five short puffs. In none of these was the bag fully inflated. The inspector decided that the appellant had failed to provide a specimen of breath for the purposes of the 1972 Act and accordingly required him under s.9 to provide a specimen of blood or urine for a laboratory test. The appellant provided a specimen of blood which subsequent analysis showed contained not less than 152 mg of alcohol in 100 ml of blood. The legal limit is 80.

The appellant elected trial by jury and eventually appeared at the Crown Court at Chelmsford. He pleaded not guilty to an indictment containing two counts under the 1972 Act. The first alleged that he drove a motor vehicle when he had a blood-alcohol concentration above the prescribed limit contrary to s.6(1).

During the trial counsel for the appellant asked the judge to exclude the evidence of the result of the analysis of the blood sample on the ground that it had been unlawfully or unfairly obtained. His submission was that the appellant had not failed to provide a specimen of breath nor had the specimens he had provided indicated that the proportion of alcohol in his blood exceeded the prescribed limit and accordingly there was no power under the 1972 Act to require him to provide the specimen of blood, which it was said was unfairly obtained because the appellant had been warned under s.9(7) that his failure to provide a specimen of blood or urine would make him liable to prosecution. The judge ruled that on the undisputed evidence the appellant had failed to provide a proper specimen of breath for a breath test by failing to inflate the bag in one breath and the evidence of the analysis of the blood test was therefore admissible. The ruling effectively deprived the appellant of his only defence to the charge under s.6(1). He therefore withdrew his plea of not guilty to that charge and admitted it and was sentenced accordingly. He now appeals against his conviction on the ground that the judge's ruling was wrong.

In *R. v. Chapman* (1) it was held that if the bag was not fully inflated in one breath that in itself constituted a failure to provide a specimen of breath for a breath test as required by the 1972 Act, with the result that the consequences of such failure prescribed by the Act would follow. A more practical view of the purpose of this legislation has since prevailed and it can now be taken as finally settled, despite some powerful dissent to the contrary on the way, that if a specimen of breath is provided which indicates a proportion of alcohol above the prescribed limit there has been no failure to provide a specimen of breath in sufficient quantity to enable the test to be carried out even though the bag has not been fully inflated and has been inflated with more than one breath. Failure to comply with the instructions for providing a specimen of breath does not of itself invalidate the test if the test result is positive: see *Director of Public Prosecutions v. Carey* (2), *R. v. Holah* (3); *Walker v. Lovell* (4) and *Attorney-General's Reference*

(1) 133 JP 405; [1969] 2 All ER 321; [1969] 2 QB 436

(2) 134 JP 59; [1970] AC 1072

(3) 137 JP 106; [1973] 1 All ER 106

(4) 139 JP 708; [1975] 3 All ER 107

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(No. 1 of 1978) (5).

In this appeal we have to consider a situation where the test results were negative. At his first attempt this appellant fully inflated the bag but he did not do so in one breath as instructed. At his subsequent attempts he did not fully inflate the bag. None of his attempts produced a positive result but it was contended that, as he did fully inflate the bag the first time, he did not fail to provide a specimen of breath as required by the 1972 Act, although it is clear from the subsequent laboratory test that the specimen he provided was useless for the purpose of indicating the proportion of alcohol in his blood. It is said that he filled the bag by blowing into it and the fact that he took more than one breath to do so is a mere breach of the manufacturers' instructions and of no legal consequence. The test proved negative. It is claimed that he did not fail the test, but that he passed it.

So far as we have discovered there is no reported authority directly dealing with this particular point, although one would expect of this fruitful branch of litigation, where it seems that no arguable defence, however technical, is ever overlooked or abandoned, that it must have arisen before.

In our view some guidance as to the true meaning of a 'breath test' in the 1972 Act is provided in s.12(1). A 'breath test' is stated in that subsection to mean a test for the purpose of obtaining an indication of the proportion of alcohol in a person's blood. The test for this purpose must be carried out by means of an approved device on a 'specimen of breath' provided by that person. By s.12(3) that person has to provide a specimen of breath in sufficient quantity to enable the test to be carried out.

Has the stated purpose of all this procedure to be wholly ignored? We do not think so. Section 12(3) refers to quantity and not quality, but, if the person provides the quantity he is asked for (one bag full) but, by ignoring the instructions he has been given, provides it in such a way that it is of a quality which does not and could not indicate the proportion of alcohol in his blood and is no reliable indication of whether the proportion of alcohol in his blood exceeds the prescribed limit, has the test contemplated by the 1972 Act been carried out? Some would think not, but judicial opinion has not all been one way.

There are powerful dicta on either side in the speeches in the House of Lords in *Director of Public Prosecutions v. Carey* (2), and *Walker v. Lovell* (4). In *Director of Public Prosecutions v. Carey* (2), Viscount Dilhorne referred to *R. v. Chapman* (1) and to a decision to the contrary effect in the High Court of Justiciary in Scotland (*Brennan v. Farrell* (6)) and continued:

- (1) 133 JP 405; [1969] 2 All ER 321; [1969] 2 QB 436
- (2) 134 JP 59; [1970] AC 1072
- (4) 139 JP 708; [1975] 3 All ER 107
- (5) (1978) 67 Crim App R 387
- (6) 1969 JC 45

'The question which of these two decisions is right does not arise for decision in this case, but it is to be observed that the only obligation imposed by the Act is to provide a sufficient quantity of breath to enable the test to be made . . . not a sufficient quantity in a single breath. I do not myself find it easy to see how a breach of the manufacturer's instructions to inflate in a single breath can be regarded as a failure or refusal to take a test when the Act making it by s.2(3) an offence without reasonable excuse to provide a quantity of breath for the test does not stipulate that it must be in a single breath'.

He referred to the question again in *Walker v. Lovell* (4) where he said:

'In my opinion these statutory provisions make it clear that a sufficient quantity of breath to enable a test to be carried out means in relation to the alcotest a sufficient quantity to inflate the bag. . . Parliament could have enacted that a failure by the motorist to comply with the maker's instructions rendered him liable to arrest and prosecution. It did not do so. All that is provided was that failure to provide a specimen of breath in sufficient quantity to enable a test to be carried out rendered him liable to arrest, and if without reasonable excuse, to prosecution. It may well be that in not stipulating that a specimen must be provided in a single breath, Parliament left a lacuna in the Act. If so, it is not one which in my view it would be proper for this House in its judicial capacity to attempt to fill'.

A different approach to the problem was made by Lord Pearson, Lord Diplock and Lord Kilbrandon. In *Director of Public Prosecutions v. Carey* (2), Lord Pearson said:

'My opinion is that there is not in this Act any absolute requirement, express or implied, that a test in order to be a "breath test" within the meaning of the Act must be carried out in perfect compliance with the makers's instructions. There is an express requirement that the test must be carried out for the purpose of obtaining an indication of the proportion of alcohol in the blood, and it follows that the police officer must be trying to use the device correctly in order to obtain a true indication. I think also that there probably is an implied requirement (not adding much for practical purposes to the express requirement) that the test must be carried out with such accuracy as is reasonably attainable in the circumstances.'

In the same case Lord Diplock said:

'The constable conducting the test must do his honest best to see that this instruction is complied with, but it should be treated in a common-sense way. In the circumstances in which the first breath

(2) 134 JP 59; [1970] AC 1072
(4) 139 JP 708; [1975] 3 All ER 107

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test at any rate is carried out little purpose would generally be served by telling the suspect that he must take between ten and twenty seconds to fill the bag, nor can the constable be expected to time him with a stop watch. The sensible thing to do, and it appears to be the common practice, is to tell the suspect to fill the bag with a single deep breath. It is, in my view, sufficient if in the constable's bona fide judgment the way in which the bag is in fact inflated by the suspect does not depart so widely from the instructions that it is likely to show a significantly greater proportion of alcohol in the suspect's blood than is actually there. There was no evidence in the present case as to what would be the effect on the indication given by the device of a departure from this instruction either by taking more than one breath or by taking less than ten seconds or more than twenty seconds to fill the bag. Any departure, however, which to the constable's knowledge would result in the device giving a lower reading of the blood-alcohol content than the true reading can be ignored by him if the result of the test is positive, since the test would still provide a sufficient indication that the proportion of alcohol exceeds the prescribed limit. If, on the other hand, the constable is not possessed of this knowledge and the departure is one which he thinks may be sufficient to make the reading given by the device lower than the true reading, he may require the suspect to repeat the test in accordance with the instructions and if the suspect fails to do so the constable may arrest him under s.2(5). If the suspect's failure is without reasonable excuse, e.g. physical disability not due to alcohol, he also commits an offence under s.2(3).

Lord Diplock in that passage was referring to sections in the Road Safety Act, 1967, which contained provisions corresponding with those in the 1972 Act.

In *Walker v. Lovell* (4) Lord Diplock referred to the approved form of breathalyser, Alcotest R80, and continued:

'It makes use of the phenomenon that alcohol present in a person's bloodstream passes into the air in his lungs where, almost but not quite immediately, it reaches a state of equilibrium at which the proportion of vapourised alcohol in that air reflects with a reasonable degree of accuracy the proportion of alcohol in his blood. So a "specimen of breath" to be provided for a breath test as defined in s.12(1) must mean air that has been drawn into and exhaled from the lungs of the person undergoing the test... The reason why the constable should communicate this instruction to the person on whom the breath test is to be carried out, is because the constable does not know in advance whether the proportion of alcohol in that person's blood does not exceed or slightly exceeds or greatly exceeds the prescribed limit. If the excess is only slight, failure to provide enough breath to inflate the bag may defeat the purpose of a "breath test" by making it impossible to obtain by means of the

Alcotest R80 an indication that the proportion of alcohol in his blood exceeds the prescribed limit, though such is indeed the fact. The same consequence may follow from using more than a single breath to inflate the bag; for to take a fresh breath may result in the specimen of breath provided containing a larger proportion of air that has not been drawn into and exhaled from the lungs than would be the case if it were provided in a single breath. Mere failure by a person on whom a breath test has been carried out to have followed the instructions of the constable is not an offence under the Act; nor does it, in my view, constitute a failure to provide a specimen of breath for a breath test within the meaning of s.8(5), unless the result of his departing from those instructions has been to defeat the purpose of the breath test by making it impossible to obtain by means of the Alcotest R80 a reliable indication whether or not the proportion of alcohol in his blood exceeds the prescribed limit.'

Lord Kilbrandon in the same case said:

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'If too little air is put into the bag, and the crystals do not change colour, the test has not been properly conducted, because the conclusion to be drawn from the non-change may be either that the proportion in the body is less than that forbidden, or that the amount of air exhaled has been inadequate to cause the change of colour to occur, although the forbidden proportion be present. The same is true, mutatis mutandis, if the bag has been inflated in short puffs. In such circumstances a constable would be entitled to arrest the motorist for failing to take the test.'

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We respectfully agree with the opinion of Lord Pearson, Lord Diplock and Lord Kilbrandon, which we believe correctly interpret what is meant by a 'breath test' in s.12(1) of the 1972 Act. To hold that the negative specimen of breath, provided in the way in which it was provided by the appellant in the present case, constituted 'a specimen of breath for a breath test' would, in our view, be to ignore the declared purpose which is part of the definition of a 'breath test' in s.12(1). The inspector was right when he decided that the appellant had failed to provide a specimen of breath for the breath test. Accordingly he was entitled to require the specimen of blood for a laboratory test, and the evidence of the result of that test was admissible. The appeal is dismissed.

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Solicitors: *R. E. T. Birch*

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Reported by G. F. L. Bridgman, Esq., Barrister.

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COURT OF APPEAL
(Watkins, L.J., Boreham, J., and Hodgson, J.)
October 16, 1980

R. v. RAYMOND

Criminal Law – Bill of indictment – Leave to prefer – Application to High Court judge – Right of defendant to be heard or otherwise make representations – Administration of Justice (Miscellaneous Provisions) Act, 1933, s.2(2).

i

The appellant was charged in committal proceedings before justices with the theft of a large sum of money and with other offences. He gave such unmistakable indications of an intention seriously to disrupt the proceedings that the prosecution decided to abandon them and seek the leave of a High Court judge to prefer a bill of indictment. On the application for leave the judge stated that he was satisfied that the interests of justice required him to grant leave to prefer and he added that there was no justification for him to depart from the usual practice of dealing with such an application on the documents without hearing counsel for the prosecution or the defendant. At the trial of the indictment it was submitted for the appellant that the judge was wrong to deny him the right to be heard, and, accordingly, in giving leave to prefer he acted without jurisdiction, the indictment was a nullity, and it should be quashed. On appeal (dismissing the appeal),

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Held: neither s.2(2) or any other section of the Administration of Justice (Miscellaneous Provisions) Act, 1933, nor the Indictment (Procedure) Rules, 1971, made under s.2(6) of the Act, gave a defendant on an application for leave to prefer a bill of indictment any right to appear before the judge; the rules were notable for their total lack of reference to a defendant, and altogether they might be taken as an acknowledgment of the fact that when a High Court judge considered an application for leave to prefer a bill of indictment he did so by an exparte procedure, a defendant having no right to be heard by him or otherwise to make representations to him; if a defendant was heard because the judge in his discretion agreed to hear him or to receive written representations from him the only issue on which he could be heard was whether the judge should grant leave to prefer a bill or whether in the circumstances committal proceedings should be undertaken; the rules of natural justice had been referred to on behalf of the appellant, in particular the audi alteram partem rule, but that rule was not applicable to the process of the preferment of a bill of indictment; there might be a discretion vested in the judge to agree to receive from or on behalf of a defendant written representations with regard to an application for leave to prefer a bill of indictment, but that discretion was only exercisable in very unusual circumstances and did not extend to hearing oral representations; in the present case no injustice had been done to the appellant by the granting of leave, and the indictment on which he was convicted was not a nullity.

iii

Appeal by Stephen Patrick Raymond against his conviction at the Central Criminal Court on three counts of theft, a restitution order and criminal bankruptcy order being made against him.

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L. Blom-Cooper, QC, and G. Robertson for the appellant.
H. Pownall, QC, and A. Suckling for the Crown.

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Watkins, L.J.

16th October, 1980. WATKINS, L.J., read the following judgment

Cur adv vult

of the court: On 10th October, 1978, at the Central Criminal Court the appellant, who raises points of law in this court, was convicted on three counts of theft and sentenced by his Honour Judge Gibbens to ten years' imprisonment on each count, to run concurrently. In addition, a restitution order was made against him for a camera, a briefcase, and 12,072.85 Swiss francs, in favour of the Trade Development Bank, London, and a criminal bankruptcy order in the sum of £78,000 was also made.

The appellant's trial lasted almost four weeks. During much of it he defended himself. At the close of the prosecution case he asked for, and was granted, the assistance of leading counsel. Thereafter counsel appeared for him and made detailed submissions in applying to quash the indictment. The judge rejected these submissions and refused the application. Counsel then departed, leaving the appellant, of his own choice, to resume his defence by himself.

At the outset of the trial he denied that he had stolen any of the money contained in the three counts on which he was convicted. Later he admitted taking the money, but contended that he had done so only because he had been the victim of duress. This defence eventually became the only issue remaining in the trial. The duress relied on was a threat made by a number of desperate criminals to shoot the appellant if he did not do what they asked of him. The threats were said to have been made in a gravel pit at Tunbridge Wells and also in the back of a motor car. The appellant, who is a highly intelligent and very articulate man, was obviously disbelieved by the jury, though not before he had extended almost to the limit the vast patience of the judge, who handled a most difficult trial with consummate skill. The appellant appeals against his convictions on the following grounds:

'1. The trial was a nullity in that the bill of indictment preferred against the appellant had been obtained otherwise than in accordance with s.2(2) of the Administration of Justice (Miscellaneous Provisions) Act, 1933 — namely, that leave to prefer a bill of indictment on the written application of 5th October, 1977, of the Director of Public Prosecutions, in accordance with r.8 of the Indictments (Procedure) Rules 1971, was granted by Michael Davies, J., in chambers on 25th October, 1977, without the learned judge hearing the defendant or counsel on his behalf.

'2. The learned trial judge wrongly refused to quash the bill of indictment in accordance with s.2(3) of the Administration of Justice (Miscellaneous Provisions) Act, 1933, on the ground either (a) that in the absence of any express statutory authority to the contrary, the courts will always insist on the observance of the rule *audi alteram partem* for the determination of any issue in legal proceedings, particularly in criminal proceedings . . . and that, to the extent that the 1971 rules permit an *ex parte* determination of the question of leave to prefer a bill of indictment the rules are ultra vires of the 1933 Act, or (b) the 1933 Act by virtue of s.2(6), in delegating the power to the Lord Chancellor to determine the manner in which bills of indictment shall be preferred, is to be

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interpreted to mean that such rules will be made subject to the rule of audi alteram partem.'

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Those grounds of appeal were drafted by counsel. The appellant has himself drafted many other grounds of appeal. He has abandoned all of them, and is content to rely now on those drafted by counsel, which have been argued for him in this court by counsel.

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The thefts committed by the appellant were the result of a carefully conceived plan which was most skilfully executed by him with the assistance of a number of other people. The facts, very briefly stated, are as follows. A company called Puralator (Services) Ltd. specialises in the carriage of currency and other valuable articles. One of its clients is the Trade Development Bank. At the beginning of May, 1976, Puralator advertised in the well-known newspaper, the Evening News, for a person who was fully experienced in the import and export business through Heathrow airport. This job provided, so it was stated, an excellent opportunity for the right person. The advertisement caught the eagle eye of the appellant, who soon became a trusted servant of Puralator.

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The strongrooms at Heathrow contain from time to time much valuable cargo. On 26th June, 1976, 48 days after the appellant had become employed by Puralator, that cargo included about £2½m worth of currency in sterling and French francs. All of it was contained in packages which could be carried away with comparative ease by one or two men. The strongrooms are heavily and carefully guarded. However, by the use of forged documents and other stratagems and his position as an employee of Puralator, the appellant on 26th June was enabled to enter a strongroom and steal from there the whole of the two and a quarter million pounds' worth of currency which was the property of the Trade Development Bank. He then left Heathrow airport to join his collaborators. Soon afterwards he travelled to Zurich via Dublin. The alertness of a shop assistant in Zurich brought about his downfall. She had read of the Heathrow theft. One day the appellant whom she did not, of course, know, entered the shop where she worked and immediately began spending a great deal of money, so much that she became suspicious of him and informed the local police about his activities. As a result he was arrested, and in June, 1977, extradited from Switzerland and brought back to this country under escort. In his prolonged absence abroad those others who had in one way and another allegedly participated in the crime were arrested, tried and, all save one, convicted of theft or of handling stolen property.

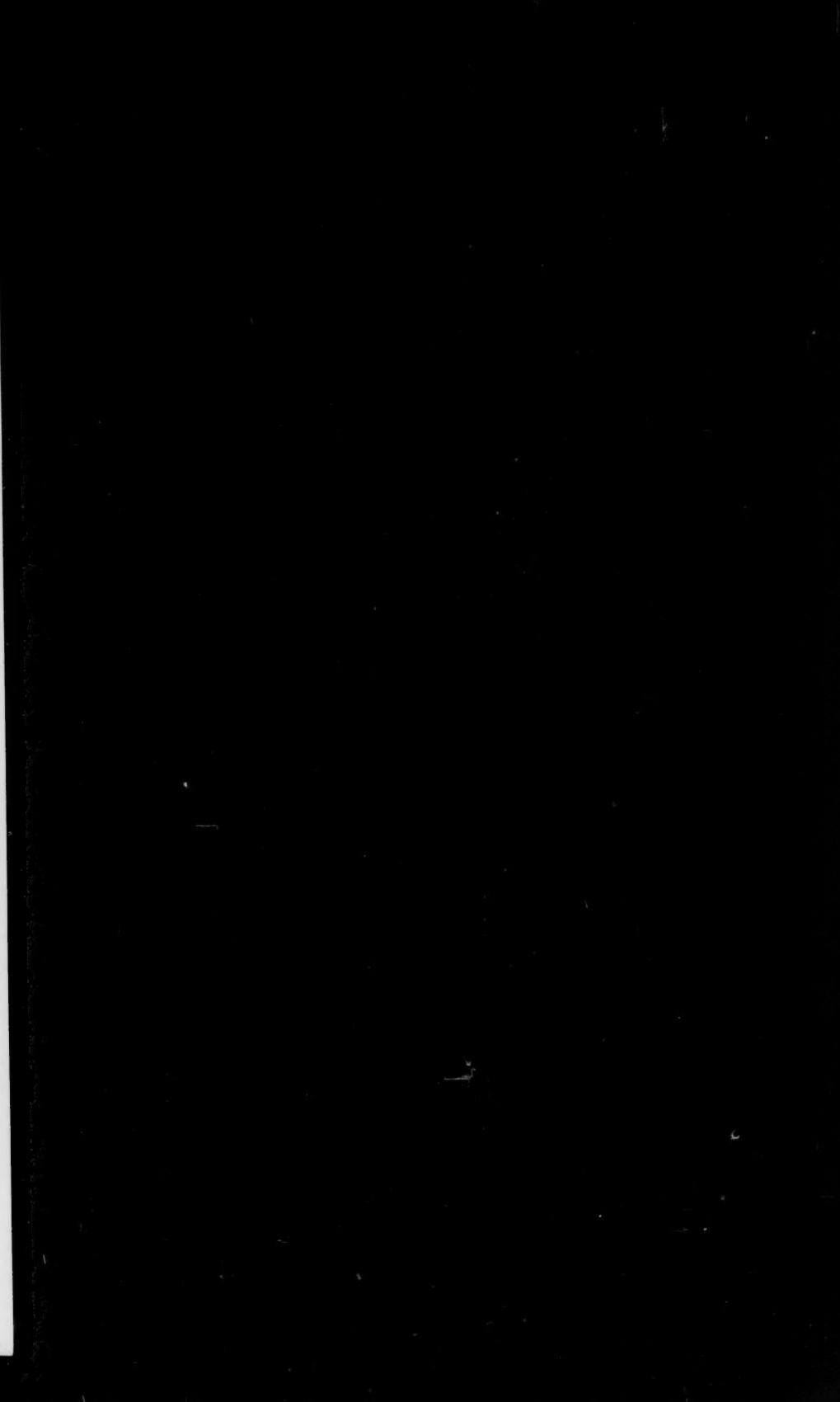
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Thus it was that the appellant alone appeared for committal for trial at the Crown Court at Staines Magistrates' Court on 29th September, 1977. There he gave such unmistakable indications of an intention seriously to disrupt the committal proceedings as to make a mockery of them that counsel for the Crown decided to abandon them and to seek leave to prefer a bill of indictment from a High Court judge. He informed the appellant's solicitor, who seems to have been in sympathy at the time with what he meant to do. The committal proceedings were thereupon abandoned, and leave to prefer a bill of indictment was sought.





The appellant's solicitor on 17th October, 1977, wrote to the courts administrator at the Central Criminal Court informing him that it was the appellant's intention to oppose the application, and he asked leave to instruct counsel to attend on the occasion when a High Court judge would consider the application to prefer a bill of indictment, in order to oppose it with the object of reinstating the committal proceedings. The solicitor was informed that his observations would be made known to the High Court judge who would be invited to consider the application. The application, together with the solicitor's letter and the reply to it, were placed before Michael Davies J, whose own observations were, at his request, afterwards made known to the appellant's solicitor. The judge stated:

'I have given full consideration to the defendant's solicitor's letter of 17th October, 1977, but in all the circumstances I am satisfied that the interests of justice require me to grant leave to prefer. Furthermore, there would have been no justification for me to have departed from the usual practice of dealing with the application on the documents without hearing counsel for the prosecution or the defendant.'

Counsel for the appellant submits that, since the appellant, by himself or by someone on his behalf, had a right to be heard on the application if he wished to do so, the judge was wrong to deny him that right. Accordingly, in giving leave to the Crown to prefer the bill of indictment, he acted without jurisdiction. So the indictment is, and always has been, a nullity, for which good reason it should have been quashed by Judge Gibbens at the trial at the Central Criminal Court at the end of the prosecution's case, if not sooner.

In order to deal comprehensively with the submissions it is necessary to trace in outline the historical development of the creation of a bill of indictment. Prior to the enactment of the Administration of Justice (Miscellaneous Provisions) Act, 1933, a grand jury was responsible for deciding whether a bill of indictment preferred against a person accused of crime was a true bill on which an accused should stand trial. If the grand jury found a true bill the accused faced trial at assizes or quarter sessions on that indictment. If it did not find a true bill the grand jury threw the bill out, and the accused was thereupon discharged. A bill presented to a grand jury could emanate from any one of the following lawful sources. (a) From a committal for trial of an accused by magistrates at which the accused was present with a right to be heard. The finding of a true bill by a grand jury from a committal by magistrates had by the year 1933 become a formality, since by that time committal proceedings had become the common form of producing a bill of indictment. (b) By the presentation of a voluntary bill of indictment, private persons could prefer such bills. Statutory inroads into their rights to do this were made by the Vexatious Indictments Act, 1859, since the right was found to be open to abuse and capable of producing injustice and hardship to an accused, who had no right to appear before and to be heard by a grand jury, which gave heed to the evidence of the accuser only. By 1933 the presentation of a voluntary bill by one

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private person against another was a rarity. (c) By the presentation of a voluntary bill of indictment with the consent of a High Court judge or the Attorney-General or the Solicitor-General (see the Vexatious Indictments Act, 1859). On this kind of presentation the findings of a true bill by a grand jury was also a formality. An accused person did not appear before and had no right to be heard by the grand jury in any manner. Nor had he the right to appear before a High Court judge or the Attorney-General or Solicitor-General. The procedures before them were always *ex parte*. (d) By a presentation resulting from an order made under the provisions of s.9 of the Perjury Act, 1911.

One of the main designs of the 1933 Act was to abolish the grand jury. It also disposed of the roles of the Attorney-General and Solicitor-General. Thus an accused person could thereafter be brought to trial only at assizes or quarter sessions as a consequence of s.2(2) of the 1933 Act, the provisions of which, so far as they need to be stated, are:

'no bill of indictment charging any person with an indictable offence shall be preferred unless either — (a) the person charged has been committed for trial for the offence; or (b) the bill is preferred . . . by the direction or with the consent of a judge of the High Court or pursuant to an order made under s.9 of the Perjury Act, 1911 . . .'

Neither by this provision nor by any other section in the 1933 Act was there introduced a new system of bringing about a trial on indictment. The Act merely did away with a virtually useless anachronism, the grand jury, and with the powers of the Attorney-General and Solicitor-General. It perpetuated the other existing procedures along with the existing powers of a High Court judge and magistrates.

We reject the submission that the 1933 Act did not have this effect, and disagree with the proposition that a precise effect of it was to substitute the High Court judge for the grand jury. The powers of a High Court judge, be it noted, find identical expression in the 1859 and 1933 Acts.

It would, we think, be proper to assume that Parliament was aware that prior to the 1933 Act, High Court judges had been using their powers under the 1859 Act by a procedure which was exclusively *ex parte*. That being so, was anything done thereafter by statute or rule to change that procedure? The 1933 Act was silent on the matter. By s.2(6) the Lord Chancellor was given rule-making power as follows:

'The Lord Chancellor may make rules for carrying this section into effect and in particular for making provision as to the manner in which and the time at which bills of indictment are to be preferred before any court and the manner in which application is to be made for the consent of a judge of the High Court or of a commissioner of assize for the preferment of a bill of indictment.'

The rules made under this subsection are now known as the Indictments (Procedure) Rules, 1971, (No 2084). Those of them which are material to this appeal provide:

'6. An application under s.2(2)(b) of the Act for consent to the preferment of a bill of indictment may be made to a judge of the High Court.

'7. Every such application shall be in writing, and shall be signed by the applicant or his solicitor.

'8. Every such application - (a) shall be accompanied by the bill of indictment which it is proposed to prefer and, unless the application is made by or on behalf of the Director of Public Prosecutions, shall also be accompanied by an affidavit by the applicant, or if the applicant is a corporation, by an affidavit by some director or officer of the corporation, that the statements contained in the application are, to the best of the deponent's knowledge, information and belief, true; and (b) shall state whether or not any application has previously been made under these Rules or any Rules revoked by these Rules and whether there have been any committal proceedings, and the result of any such application or proceedings.

'9. - (1) Where there have been no committal proceedings, the application shall state the reason why it is desired to prefer a bill without such proceedings and - (a) there shall accompany the application proofs of the evidence of the witnesses whom it is proposed to call in support of the charges; and (b) the application shall embody a statement that the evidence shown by the proofs will be available at the trial and that the case disclosed by the proofs is, to the best of the knowledge, information and belief of the applicant, substantially a true case.

'(2) Where there have been committal proceedings, and the justice or justices have refused to commit the accused for trial, the application shall be accompanied by - (a) a copy of the depositions; and (b) proofs of any evidence which it is proposed to call in support of the charges so far as that evidence is not contained in the depositions; and the application shall embody a statement that the evidence shown by the proofs and (except so far as may be expressly stated to the contrary in the application) the evidence shown by the depositions, will be available at the trial and that the case disclosed by the depositions and proofs is, to the best of the knowledge, information and belief of the applicant, substantially a true case.

'(3) Where the accused has been committed for trial the application shall state why the application is made and shall be accompanied by proofs of any evidence which it is proposed to call in support of the charges, so far as that evidence is not contained in the depositions, and, unless the depositions have already been transmitted to the judge to whom the application is made, shall also be accompanied by a copy of the depositions; and the application shall embody a statement that the evidence shown by the proofs will be available at the trial, and that the case disclosed by the depositions and proofs is, to the best of the knowledge, information and belief of the applicant, substantially a true case.

'10. Unless the judge otherwise directs in any particular case, his decision on the application shall be signified in writing on the application without requiring the attendance before him of the

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applicant or of any of the witnesses, and if the judge thinks fit to require the attendance of the applicant or of any of the witnesses, their attendance shall not be in open court. Unless the judge gives a direction to the contrary, where an applicant is required to attend as aforesaid, he may attend by a solicitor or by counsel.'

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Those rules are notable for their total lack of reference to an accused, or a defendant as he is now called. Altogether they may be taken as an acknowledgment of the fact that when a High Court judge considers an application for leave to prefer a bill of indictment he does so by an ex parte procedure as he has been doing since 1859, a defendant having no right to be heard by him or otherwise to make representations to him. Moreover they may be taken as a determination to perpetuate that procedure. This view of the matter seems to have been universally accepted until lately. It has taken an almost immeasurably long time for an attempted demolition of this ex parte procedure to commence via the grounds of appeal in the present case. However, the attempt may be none the worse for its very recent origins.

We accept, of course, that, especially since the 1933 Act came into force, the principal means of bringing a defendant to trial on indictment is by committal by magistrates, which, since the coming into force of the Criminal Justice Act, 1967, is usually performed by use of the provisions of s.1 of that Act, which allows in given circumstances a committal for trial without consideration of the evidence. To avoid this procedure by seeking the leave of a High Court judge to prefer a bill of indictment (the word 'voluntary' does not appear in modern legislation) is undoubtedly to take a very exceptional step.

In the forefront of his submissions counsel for the appellant contends (i) the issue confronting a High Court judge on receipt by him of an application for leave to prefer a bill of indictment is not whether the statements or other evidence which support the application for leave to prefer disclose a *prima facie* case, but whether that vital decision should be taken by magistrates or exceptionally by preferment of a bill by the judge's leave, and (ii) that the 1933 Act requires that the defendant should be heard on the application if he wishes.

We find no difficulty in accepting that, if a defendant has a right to be heard and exercises it, or is heard only because of the judge in his discretion has agreed to hear him or to receive written representations from him, the only issue on which he can be heard is whether the judge should determine the application for leave to prefer a bill of indictment, or whether in the circumstances committal proceedings should be undertaken. But with the bold assertion that the 1933 Act gave a right to a defendant to be heard by, or otherwise to make representation to, a judge we cannot agree.

Support for this assertion is said to be derived from the elimination of the roles of the Attorney-General and Solicitor-General, which is said to be an indication that the executive element prior to the 1933 Act was dispensed with, leaving only procedures in which the High Court judge and magistrates take decisions by acting judicially. The 1971 rules, especially r.10, if they are to be taken as referable only to an ex parte procedure, are ultra vires of the 1933 Act, by the passing of

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which Parliament must have intended to give the right contended for, regardless of whether a defendant could show prejudice to himself by denial of the right.

In this behalf much reference was made to the Privy Council case of *Public Prosecutor v. Fan Yew Teng* (1). In giving the judgment of the Board, Lord Salmon stated (at 852):

'On the particular facts of the present case the respondent has not suffered one iota of prejudice. It was he who made the application for transfer. None of the facts was in dispute. If there had been committal proceedings, he must have been committed for trial and the result of the trial would have depended solely upon the difficult points of law in issue. Moreover at the trial he never took the point that the court lacked jurisdiction to try him because he had not been committed for trial. No question of waiver however has or could successfully have been argued before this Board. Everything depends upon the true construction of the statute, which has a much wider application than to the special facts of this particular case. It may be that an amendment to the statute is desirable in order to make committal proceedings unnecessary in such very special circumstances as these. But this is irrelevant; the Board must apply the law as it now exists and their Lordships are of the opinion that s.138 [of the Malaysian Criminal Procedure Code] applies to all trials in the High Court including those following an order made under s.417.'

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(1) [1973] AC 846

(2) [1937] 4 All ER 320

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a judge exercises on the merits of an application to prefer a bill of indictment. This discretion, which has been exercised ever since the 1859 Act, could, it was said, be exercised providing there had been essential compliance with the Indictments (Procedure) Rules. The case involved an alleged failure to comply with r.5(a) of the 1933 rules (SR & O 1933 No.745). We observe that in *Rothfield's* (2) case it was exercised without representation by the defendant, and no point was taken about this during the hearing of the appeal in this court. Finally, it is not inappropriate to note that *Rothfield's* case is authority for the proposition that this court will not interfere with the exercise by the judge of his discretion, providing he had jurisdiction to entertain the application for leave to prefer the bill. We cannot regard it as an authority which helps to show that the 1933 Act conferred the right contended for in the present case.

The next submission argued in a number of ways, to not all of which do we feel called on to make special reference, relates to the rules of natural justice, in particular the audi alteram partem rule. The 1933 Act being silent about the matter, the court, so it is argued, is enabled, indeed required, so to exercise its inherent jurisdiction as to allow a defendant to have his say on an application for leave to prefer a bill of indictment; fairness requires also that he should have formal notice of the application and be told the ground on which it is based. It is further argued that there has been a revolution in judicial practice with regard to natural justice, that judges are far more sensitive than they used to be to the necessity for an inter partes hearing to take place where once upon a time an ex parte hearing was deemed to meet the requirements of justice and that this current attitude should induce a fresh construction of the 1933 Act: see *Dyson Holdings Ltd. v. Fox* (3).

The audi alteram partem rule was dealt with extensively in *Wiseman v. Borneman* (4) where Lord Reid stated:

iv 'Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard and fast rules. For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation.'

v Lord Morris stated:

That the conception of natural justice should at all stages guide those who discharge judicial functions is not merely an acceptable but is an essential part of the philosophy of the law. We often speak

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- (2) [1937] 4 All ER 320
- (3) [1975] 3 All ER 1030
- (4) [1971] AC 297

of the rules of natural justice. But there is nothing rigid or mechanical about them. What they comprehend has been analysed and described in many authorities. But any analysis must bring into relief rather their spirit and their inspiration than any precision of definition or precision as to application. We do not search for prescriptions which will lay down exactly what must, in various divergent situations, be done. The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair. Natural justice, it has been said, is only "fair play in action". Nor do we wait for directions from Parliament. The common law has abundant riches; there may we find what Byles, J., called "the justice of the common law" (*Cooper v. Wandsworth Board of Works* (5)).

In a large number of other recent cases judicial comment of similar kind has been expressed, but those two outstanding commentaries on natural justice surely suffice to illustrate the great importance our courts attach to providing a right to be heard to persons who become involved in civil or criminal matters. The audi alteram partem rule is also instructively and helpfully discussed in de Smith's *Judicial Review of Administrative Action* (4th edn., 1980). But this rule is not unfailingly to be invoked in every conceivable kind of court proceeding or initiation of court proceedings such as the laying of an information, merely because a person asserts that he has a right to be heard. Ex parte proceedings still take place in our courts regularly for a multiplicity of reasons and purposes. There are many exclusions from the rule, as de Smith's work shows. In that work it is asserted (with justification, we think) that the courts should not fly in the face of a clearly evinced Parliamentary intention to exclude the operation of the rule (see p.179); and later it is stated (p.199):

'Where an act or proposal is only the first step in a sequence of measures which may culminate in a decision detrimental to a person's interests the courts will generally decline to accede to that person's submission that he is entitled to be heard in opposition to this initial act, particularly if he is entitled to be heard at a later stage.'

Moreover, Lord Reid went on in his speech in *Wiseman's* case (4):

'It is, I think, not entirely irrelevant to have in mind that it is very unusual for there to be a judicial determination of the question whether there is a prima facie case. Every public officer who has to decide whether to prosecute or raise proceedings ought first to decide whether there is a prima facie case, but no one supposes that justice requires that he should first seek the comments of the accused or the defendant on the material before him. So there is nothing inherently unjust in reaching such a decision in the absence of the other party.'

(4) [1971] AC 297

(5) (1863) 14 CBNS 180

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To that we would add, with respect, that there is nothing inherently unjust in a High Court judge deciding whether he will entertain an application to prefer a bill of indictment without seeking the comments of the defendant, who will undoubtedly have the right to be heard at his trial.

We believe that the *audi alteram partem* rule is inapplicable to the process of the preferment of a bill of indictment. There is nothing unjust in the *ex parte* nature of this procedure, which is undertaken in exceptional circumstances. Furthermore, we take the view that by the 1933 Act Parliament intentionally denied to a defendant a right to be heard. Consequently, we decline to undertake a fresh construction of the 1933 Act on the basis that the *audi alteram partem* rule should apply to the present case. In any case, we doubt that even in that circumstance it would be open to us to do so. The decision in *Dyson's* case (3) turned on very special facts and is not, we think, of general application.

We were reminded that some courts may at any time set aside an order made *ex parte*: see RSC Ord 32, r.6, and *HMS Archer* (6).

Whether a criminal court has the power in its undoubted inherent jurisdiction (as to which see what Lord Morris said in *Connelly v. Director of Public Prosecutions* (7) to set aside leave to prefer a bill of indictment granted *ex parte*, we do not now in disposing of this appeal have to decide. But we think it right to say that we know of no instance of this power having been used in the past, and cannot envisage a circumstance in which a court would be called on to invoke it in the future, having regard to the view that we take of the construction to be placed on the provisions of the 1933 Act and the 1971 rules.

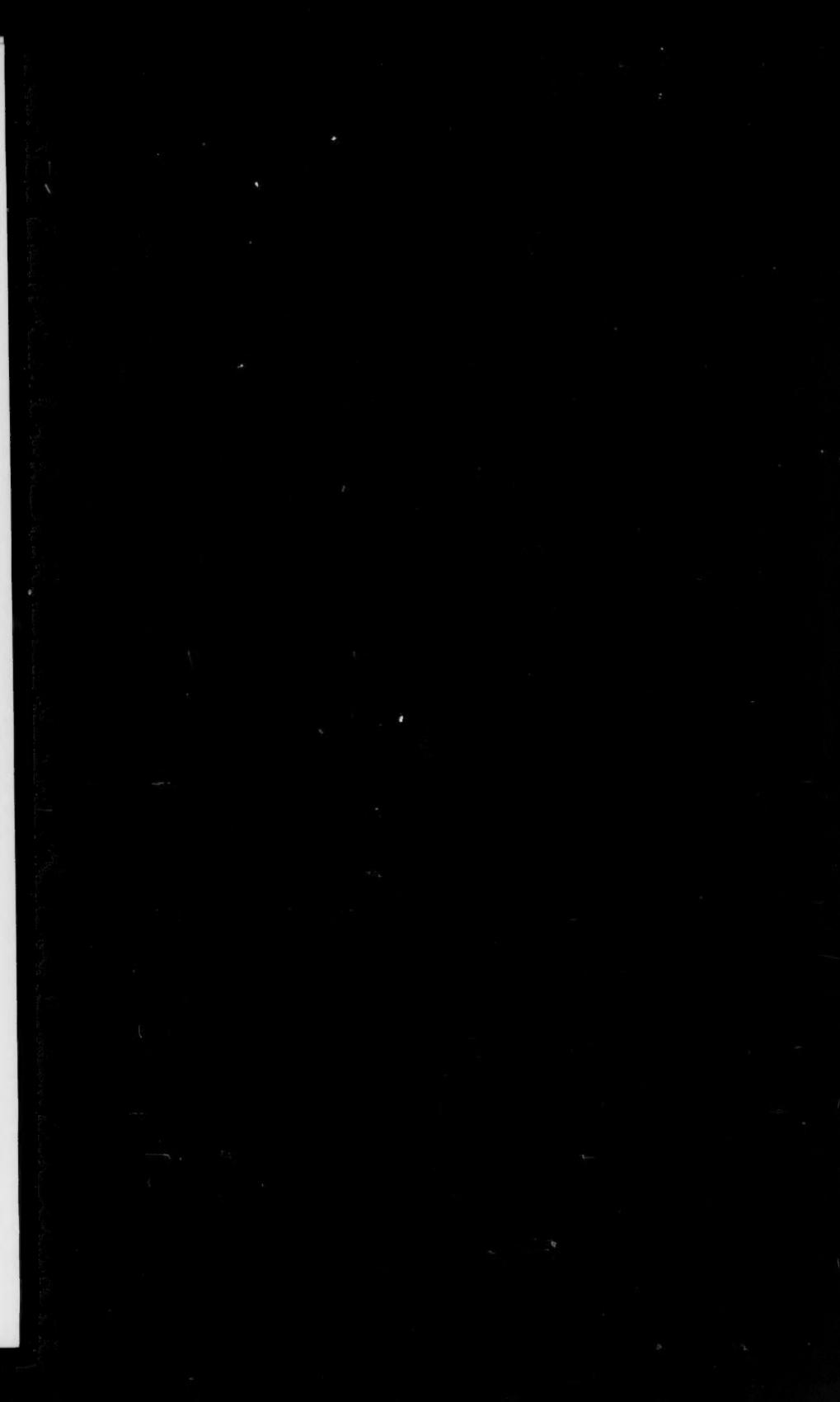
The trial judge was doubtful whether he could entertain an application to quash an indictment, leave to prefer which had been granted by a High Court judge. Nevertheless he acted on the assumption that he had the right to do so before rejecting the submissions made to him in this respect. This point was not argued before us, except possibly in a cursory way, and, since our views on it can have no influence on the decision we have reached on the main grounds of appeal, we say nothing of them, beyond expressing a tentative belief that it is for this court, and not another High Court judge or circuit judge, to review a decision made by a High Court judge on an application to him for leave to prefer a bill of indictment. Obviously, under the present appellate system this would involve a trial of the indictment, before an appeal from any consequence of the trial could be made to this court. In any event, we have no doubt that the trial judge here rightly rejected the motion to quash the indictment.

In our judgment, a defendant has no right to appear by himself or by someone on his behalf before a High Court judge who is considering an application for leave to prefer a bill of indictment against him. He has no right to make any kind of representation whatever to that judge.

(3) [1975] 3 All ER 1030

(6) [1919] P. 1

(7) 128 JP 418





There may well be a discretion vested in the judge to agree to receive written representations with regard to an application for leave to prefer a bill from, or on behalf of, a defendant. That discretion, exercisable, we think, only in very unusual circumstances, does not extend, in our opinion, to hearing oral representations. But if, contrary to our opinion, the discretion does go that far, we are further of the opinion it is only in an extraordinary circumstance that it should be exercised in favour of a defendant.

In the present case Michael Davies, J., in his discretion seems merely to have agreed to look at the representations made on behalf of the appellant in the letter written by his solicitor to the courts administrator at the Central Criminal Court on 17th October, 1977. These representations were as follows:

'1. The charges involved the theft or dishonest obtaining of a sum in excess of £2,000,000. The defendant should have the opportunity to test and probe the evidence at committal proceedings in such a serious matter.

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'2. The defendant should have the opportunity to call witnesses for the defence at committal proceedings especially as there are a number of relevant witnesses who gave evidence in the spring of 1977 at another trial relating to this matter [see *R. v. Franciosy* (8)] who are not relied upon against this defendant.

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'3. The defendant was extradited to this country in July, 1977, after spending one year in custody in Switzerland. After this lapse of time the preparation of his defence may be more difficult if he is disallowed the opportunity of hearing the evidence of the prosecution at committal proceedings.

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'4. This is not a case where a bill is necessary because other defendants have already been committed for and are awaiting trial. In fact the other defendants have been tried as indicated above, and in four cases convicted.

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'5. It is not an abuse of the process of the courts for the defendant to require the attendance of the prosecution witnesses at committal proceedings; this is a common feature of fraud cases or cases of a serious nature such as this.

'6. This particular defendant instructs us that if a bill is granted he will feel that he has been deprived of his rights and treated unjustly.'

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Having considered them, Michael Davies, J., rejected them totally as appears from his already quoted observations, and declared his intention of following the 'usual practice'. It is the usual practice for applications to prefer bills of indictment to be dealt with on the documents which accompany the application, and on nothing else. Departures from this practice have been extremely rare. We refer to an instance of it in which this appellant was again concerned.

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Early in 1979 he and others appeared in committal proceedings on a charge of conspiracy to pervert the course of justice. His behaviour over a protracted period in those proceedings seriously disrupted them. The Director of Public Prosecutions therefore decided to seek leave to prefer a bill of indictment against him. The application came before Talbot, J., on 15th March 1979. He allowed the appellant to appear before him and to make representations that the bill be not preferred and that the committal proceedings be allowed to continue. The judge granted the application for leave to prefer, since he was satisfied that the appellant had abused the processes of the magistrates' court at St Albans, where the committal proceedings were taking place, and the documents before him showed a *prima facie* case against the appellant.

We do not doubt that, had Michael Davies, J., permitted this appellant to appear before him by himself or by someone on his behalf to make oral representations, in the circumstances known to us of this appellant's behaviour and threatened behaviour at the Staines Magistrates' Court, he would inevitably have rejected the application for committal proceedings to take place, and would have granted the application for leave to prefer a bill of indictment. That decision would not have been open to review by this court. No injustice whatever was done to this appellant by the granting of leave. The indictment on which he was convicted was not, and is not, a nullity. There can be no doubt that the appellant is becoming, if has not already become, a practised disturber of court proceedings. In agreeing to receive and consider the written representations made by his solicitor on the appellant's behalf, Michael Davies, J., probably paid him much more regard than he ever deserved. For those reasons this appeal is dismissed.

Solicitors: *Hallinan, Blackburn Gittings & Co; R.E.T. Birch.*

Reported by G.F.L. Bridgman, Esq., Barrister.

COURT OF APPEAL
(Lord Lane, C.J., Comyn, J., and Stuart-Smith, J.)
May 19, 1981

R.v. Lucas

Court of Appeal

R. v. LUCAS

Criminal Law – Evidence – Accomplice – Corroboration – False evidence by defendant.

The appellant was convicted in the Crown Court of being concerned in the fraudulent evasion of the prohibition of the importation of cannabis, a controlled drug, contrary to the Misuse of Drugs Act, 1971. At the trial one A, an accomplice, gave evidence in detail implicating the appellant. On an appeal by the appellant,

Held (allowing the appeal): the fact that the jury might feel sure that the accomplice's evidence was to be preferred to that of the defendant and that the defendant accordingly must have been lying in the witness box was not of itself something which could be treated by the jury as corroboration of the accomplice's evidence; it was only if the accomplice's evidence was believed that there was any necessity to look for corroboration of it; if the belief that the accomplice was truthful meant that the defendant was untruthful and if that untruthfulness could be used as corroboration, the practical effect would be to dispense with the need of corroboration altogether; for a lie told by a defendant whether in court or out of court to amount to corroboration of the evidence of an accomplice it must (i) be deliberate, (ii) it must relate to a material issue, (iii) the motive for a lie must be a realization of guilt and a fear of the truth, for the statement in question must be clearly shown to be a lie by evidence other than that of the accomplice, that is to say, by admission of evidence from an independent witness.

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Appeal by Iyabode Ruth Lucas against her conviction at Reading Crown Court of being knowingly concerned in the fraudulent evasion of the prohibition of the importation into this country of a controlled drug, namely cannabis, contrary to s.45(1) of the Customs & Excise Act, 1952, as extended by s.26(1) of the Misuse of Drugs Act, 1971.

W.E.M. Taylor for the appellant.
D. Blair for the Crown.

19th May, 1981. LORD LANE, C.J., read the following judgment of the court: This is an appeal pursuant to leave of the full court by Iyabode Ruth Lucas against her conviction at the Crown Court at Reading on 23rd November, 1979, on two counts of being knowingly concerned in the fraudulent evasion of the prohibition of the importation into this country of a controlled drug, namely cannabis, contrary to the Misuse of Drugs Act, 1971. The first count was in respect of an importation on 12th December, 1978, through Gatwick airport and related to 25.17 kg of the drug, and the second was in respect of an importation some two months later through Heathrow airport of 18.12 kg. In both cases the appellant had arrived here from Nigeria. The jury first brought in a verdict of guilty on the Heathrow count. That verdict was unanimous. Then, after a further direction, they returned 22 minutes later giving a ten to two majority verdict of guilty on the Gatwick count. The judge sentenced the appellant to three years' imprisonment on the Heathrow count and two years' imprisonment on the Gatwick count to run concurrently.

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In both counts the appellant was charged together with a man called Fritz Emanuel Bastian. Bastian originally pleaded not guilty to the Gatwick count but guilty to the Heathrow count. During the trial he changed his plea to one of guilty on the Gatwick count also. The appellant and Bastian were admittedly together on both occasions. On the first occasion they were accompanied by a man called Crike Areh. Areh was charged independently with an offence in the terms of the Gatwick count, pleaded guilty to it at the Crown Court at Lewes, and was sentenced to eighteen months' imprisonment. He took no part at all in the Heathrow matter. At the trial of this appellant and Bastian, Areh gave evidence in detail implicating both of them in the Gatwick count. The only material point in this appeal is whether the judge gave the correct direction on the question of corroboration of Areh's evidence. Counsel for the appellant therefore directs his main attack against the Gatwick conviction, that is count 1, but seeks to keep alive his contention that the conviction on count 2 (Heathrow) is tainted by any defect in the conviction on count 1.

We can dispose of that matter at once. The fault which we are constrained to say occurred in respect of the Gatwick count does not, in our judgment, in any way affect the validity of the conviction on the second, the Heathrow, count. The judge most carefully pointed out to the jury that the two counts were separate and had to be considered by them separately. That they fully heeded that direction was plain from the different form of their verdicts: unanimous in regard to the Heathrow count, and ten to two majority in respect of the Gatwick count. It only remains to say of the Heathrow count that there was very strong evidence implicating the appellant, and that the keys of a suitcase containing cannabis which Bastian tried to smuggle through Customs were found shortly afterwards in the appellant's fur coat. His and her attempted explanation that he put them there unknown to her was plainly and understandably rejected by the jury. The appeal in respect of the second count fails.

What counsel for the appellant says about the Gatwick count is this. Areh was undoubtedly an accomplice; therefore it was incumbent on the judge to give the usual warning to the jury about the dangers of convicting on his uncorroborated evidence, and then to point out any potentially corroborative facts. There is no dispute that the warning was given in impeccable terms. The complaint is confined to the way in which the judge directed the jury as to what might be considered by them as corroboration.

Having explained to the jury that they were entitled to convict on the evidence of the accomplice even though uncorroborated, provided they heeded the warning as to the dangers of so doing, he went on to explain that such corroboration could be found in the evidence of the defendant herself. He correctly directed the jury that, when a defendant tells lies, there may be reasons for those lies which are not connected with guilt of the offences charged and that one of their tasks would be to decide, if the defendant had told lies, what their purpose was.

He went on to say:

'In the same way it is said that the defendant lied to you on

various matters, and you will consider those aspects . . . If you weigh the defendant's evidence, if you reject it on many aspects, you are entitled to say: "Why has this evidence, which we the jury reject, been given to us by the defendant?" If there is only one possible answer (for example, that Mr Arch, though wholly unsupported, was telling the truth) you are entitled to give your answer to that question in your two verdicts, providing you bear in mind my warning to look for independent support of the evidence of a tainted man.'

Apart from that passage, there is nothing in the direction which suggests to the jury what, if anything, is capable of amounting to corroboration of the accomplice's evidence. Although read literally the judge does not say so, the jury may have received the impression that they were entitled to ask themselves whether they rejected the defendant's evidence given before them, and, if the answer was Yes, to use their consequent conclusion that she had lied to them as corroboration of Arch's evidence. This was certainly what counsel for the Crown thought the judge was saying, because at the close of the summing-up, in the absence of the jury, he invited the judge to clarify the matter. That invitation was not accepted.

We accept that the words, used in the context in which they were, were probably taken by the jury as a direction that lies told by the defendant in the witness box could be considered as corroborative of an accomplice's evidence, and we approach the case on that footing.

The fact that the jury may feel sure that the accomplice's evidence is to be preferred to that of the defendant and that the defendant accordingly must have been lying in the witness box is not of itself something which can be treated by the jury as corroboration of the accomplice's evidence. It is only if the accomplice's evidence is believed that there is any necessity to look for corroboration of it. If the belief that the accomplice is truthful means that the defendant was untruthful and if that untruthfulness can be used as corroboration, the practical effect would be to dispense with the need of corroboration altogether.

The matter was put in this way by Lord MacDermott in *Tumahole Bereng v. R.* (1):

'Nor does an accused corroborate an accomplice merely by giving evidence which is not accepted and must therefore be regarded as false. Corroboration may well be found in the evidence of an accused person; but that is a different matter, for there confirmation comes, if at all, from what is said, and not from the falsity of what is said.'

There is, without doubt, some confusion in the authorities as to the extent to which lies may in some circumstances provide corroboration and it was this confusion which probably and understandably led the judge astray in the present case. In our judgment the position is as follows. Statements made out of court, for example statements to the police, which are proved or admitted to be false may in certain circumstances amount to corroboration. There is no shortage of authority

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for this proposition (see, for example, *R. v. Knight* (2) and *Credland v. Knowler* (3). It accords with good sense that a lie told by a defendant about a material issue may show that the liar knew that if he told the truth he would be sealing his fate. In the words of Lord Dunedin in *Dawson v. M'Kenzie* (4), cited with approval by Lord Goddard CJ in *Credland v. Knowler* (3):

i 'the opportunity may have a complexion put upon it by statements made by the defender which are proved to be false. It is not that a false statement made by the defender proves that the pursuer's statements are true, but it may give to a proved opportunity a different complexion from what it would have borne had no such false statement been made.'

ii To be capable of amounting to corroboration the lie told out of court must first of all be deliberate. Secondly it must relate to a material issue. Thirdly the motive for the lie must be a realisation of guilt and a fear of the truth. The jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame, or out of a wish to conceal disgraceful behaviour from their family. Fourthly the statement must be clearly shown to be a lie by evidence other than that of the accomplice who is to be corroborated, that is to say by admission or by evidence from an independent witness.

iii As a matter of good sense it is difficult to see why, subject to the same safeguard, lies proved to have been told in court by a defendant should not equally be capable of providing corroboration. In other common law jurisdictions they are so treated: see the cases collated by Professor J.D. Heydon (89 LQR at 561) and cited with apparent approval in Cross on Evidence (5th edn, p.210).

iv It has been suggested that there are dicta in *R. v. Chapman* (5), to the effect that lies so told in court can never be capable of providing corroboration of other evidence given against a defendant. We agree with the comment on this case in Cross on Evidence (5th edn, pp.210-211) that the court there may only have been intending to go no further than to apply the passage from the speech of Lord MacDermott in *Tumahole Bereng v. R.* (1) which we have already cited.

v In our view the decision in *R. v. Chapman* (5) on the point there in issue was correct. The decision should not, however, be regarded as going any further than we have already stated. Properly understood, it is not authority for the proposition that in no circumstances can lies told by a defendant in court provide material corroboration of an accomplice. We can find ourselves in agreement with the comment on

(1) [1949] AC 253

(2) 130 JP 187; [1966] 1 All ER 647

(3) (1951) 35 Crim. App. R. 48

(4) 1908 S.C. 648

(5) 137 JP 525; [1973] 2 All ER 624

this decision made by this court in *R. v. Boardman* (6). That point was not subsequently discussed when that case was before the House of Lords.

The main evidence against Chapman and his co-defendant Baldwin was a man called Thatcher, who was undoubtedly an accomplice in the alleged theft and dishonest handling of large quantities of clothing. The defence was that Thatcher was lying when he implicated the defendants and that he must himself have stolen the goods. The judge gave the jury the necessary warning about accomplice evidence and the requirement of corroboration, and then went on to say this:

'If you think that Chapman's story about the disappearance of the van and its contents is so obviously untrue that you do not attach any weight to it at all — in other words, you think Chapman is lying to you — then I direct you that that is capable of corroborating Thatcher because . . . if Chapman is lying about the van, can there be any explanation except that Thatcher is telling the truth about how it came to disappear? . . . My direction is that it is capable in law of corroborating Thatcher. Similarly in the case of Baldwin, if you think that Baldwin's story about going up to London and buying these goods . . . is untrue — in other words he has told you lies about that — then . . . that, I direct you, so far as he is concerned, is capable of amounting to corroboration of Thatcher.'

That being the direction which this court was then considering, the decision is plainly correct, because the jury were being invited to prefer the evidence of the accomplice to that of the defendant and then without more to use their disbelief of the defendant as corroboration of the accomplice.

Providing that the lies told in court fulfil the four criteria which we have set out above, we are unable to see why they should not be available for the jury to consider in just the same way as lies told out of court. So far as the instant case is concerned, the judge, we feel, fell into the same error as the judge did in *R. v. Chapman*. The lie told by the defendant was clearly not shown to be a lie by evidence other than that of the accomplice who was to be corroborated and consequently the apparent direction that a lie was capable of providing corroboration was erroneous. It is for that reason that we have reached the conclusion that the conviction on the Gatwick count, that is count 1, must be quashed and the appeal to that extent is allowed.

Reported by G.F.L. Bridgman, Esq., Barrister.

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QUEEN'S BENCH DIVISION
(Ackner, L.J. and Skinner, J.)
January 21, 1981

R. v. GOVERNOR OF PENTONVILLE PRISON. Ex parte SINGH

i *Extradition – Treaty – Liberal interpretation – "Sworn depositions or statements of witness" – Extension to affirmations – Constitution of valid affirmation.*

The government of Norway sought the extradition of the applicant who, they alleged, had committed offences with regard to dangerous drugs in respect of which a prohibition order against their importation was in force in Norway. The Chief Metropolitan Magistrate, having heard evidence, committed the applicant to prison to await his extradition to Norway. The applicant applied for a writ of habeas corpus in respect of that warrant.

ii By art. X of the extradition treaty between the two countries: "In the examinations which they have to make . . . the authorities of the State applied to shall admit as entirely valid evidence the sworn depositions or statements of witnesses taken in the other State . . . and likewise the warrants and sentences issued therein"

iii Held: extradition treaties should receive a liberal interpretation, and, bearing in mind that one of the intents of the treaty was to avoid the necessity of bringing witnesses from overseas, a justifiable liberal interpretation of the treaty involved construing the words "sworn depositions or statements of witnesses" as extending to affirmations; it was not suggested that the formula "I do . . . solemnly, sincerely, and truly declare and affirm" or any closely comparable formula had to be used, but the mere signature to a document or the verbal acknowledgment that its contents were correct could not amount to an affirmation; where the line was to be drawn could not be precise, it must be a matter of fact and degree, what was required where the statement had been made was its adoption in circumstances which recognised the gravity and importance of the truth being told on the particular occasion; in the present case there was sufficient evidence to justify the magistrate's conclusion that a *prima facie* case had been made out by the Norwegian government, and the appeal would be dismissed.

iv Per Skinner, J.: "The document put forward as an affirmation must contain, or show on its face, a solemn declaration by the witness before a judicial authority that its contents are true . . . The vital constituent is the solemn declaration of the truth which might be expressed in a number of different ways."

v Application by Harmohan Singh for a writ of habeas corpus directed to the governor of Pentonville Prison.

21st January 1981. The following judgments were read.

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ACKNER, L.J. Harmohan Singh applies for a writ of habeas corpus in respect of a warrant of committal issued by the Chief Metropolitan Stipendiary Magistrate at Bow Street Magistrates' Court on 23rd October, 1980. The government of Norway allege that the applicant is accused of the commission of the crimes of conspiring to supply a dangerous drug, supplying a dangerous drug, and being knowingly concerned in carrying, removing, depositing, harbouring, keeping or

concealing or in any manner dealing with a dangerous drug in respect of which a prohibition on importation is, for the time being, in force within the jurisdiction of the government of Norway. The drugs involved are alleged to be morphine and heroin. The magistrate, having heard evidence produced by the government of Norway and submissions on behalf of both the applicant and that government, held that there was a case to answer, and committed the applicant to prison to await his extradition to Norway.

Counsel for the applicant in his most helpful, clear and concise submissions has pointed out that the evidence fell into four different classes: (i) evidence on oath before the court in Oslo; (ii) statements by four persons, two Norwegians and two Indians, who were accomplices to the alleged crimes; they had all been arrested in Norway prior to signing their statements; (iii) evidence on oath by witnesses who gave evidence before a court in Copenhagen; (iv) evidence of English police officers given under s.9 of the Criminal Justice Act, 1967.

Counsel submitted that the material in classes (ii) and (iii) was not admissible evidence in extradition proceedings in England, and the remaining evidence was not sufficient to justify the committal. He made four submissions. (i) The Extradition Acts, 1870 and 1873, read together with the relevant treaty required that the evidence taken in the requesting State, that is Norway, has to be taken on oath if it is to be admissible in the courts in this country. (ii) Alternatively, if the above proposition is too wide and evidence can be taken on affirmation, then the procedure which took place in Norway was deficient to such a degree as to make the material inadmissible in this country. The procedure was deficient because (a) it did not comply with the Acts and the treaty and (b) it did not comply with United Kingdom rules as to competence of witnesses or admissibility of evidence. (iii) In relation to the evidence given in the court in Copenhagen, the treaty did not permit evidence, whether on oath or otherwise, given in the third State to be admissible in a holding State. (iv) On the assumption that the above three submissions were correct, or alternatively that the first two submissions were correct, the remaining evidence was insufficient to justify the committal.

It is convenient to deal first of all with the third submission. The treaty relied on, concluded on 26th June, 1873, and the subject-matter of an Order in Council made on 13th September, 1873, provided in art X as follows:

"In the examinations which they have to make, in accordance with the foregoing stipulations, the authorities of the State applied to shall admit as entirely valid evidence the sworn depositions or statements of witnesses taken in the other State, or copies thereof, and likewise the warrants and sentences issued therein, provided such documents are signed or certified by a judge, magistrate, or officer of such State, and are authenticated by the oath of some witness, or by being sealed with the official seal of the Minister of Justice or some other Minister of State."

Counsel for the applicant submits, and counsel for the prison governor

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and the government of Norway, the respondents, concedes, that the words 'taken in the other State' make inadmissible the sworn depositions or statements taken in Denmark. However, it is common ground that the exclusion of the evidence given in Copenhagen leaves an adequacy of material to establish a *prima facie* case, and I therefore turn to deal with the first two submissions.

As to the first submission, s.14 of the Extradition Act, 1870, provides:

'Depositions or statements on oath, taken in a foreign State, and copies of such original depositions or statements, and foreign certificates of or judicial documents stating the fact of conviction, may, if duly authenticated, be received in evidence in proceedings under this Act.'

Lord Brougham's Act, 1850, the worthy object of which was entitled 'An Act for shortening the language used in Acts of Parliament,' provided in s.4, *inter alia*:

'That in all Acts . . . the words "oath," "swear" and "affidavit" shall include affirmation, declaration, affirming, and declaring, in the case of persons by law allowed to declare or affirm instead of swearing.'

Nevertheless shortly before the Order in Council referred to above, namely, on 5th August, 1873, the Extradition Act, 1873, was passed and this provided by s.4:

'The provisions of the principal Act relating to depositions and statements on oath taken in a foreign State, and copies of such original depositions and statements, do and shall extend to affirmations taken in a foreign State, and copies of such affirmations.'

Counsel for the applicant rightly points out that Lord Brougham's Act only applies to Acts of Parliament and not to treaties. Article X makes no reference to affirmations and he therefore contends that there is no justification for construing the words 'sworn depositions or statements of witnesses' to include affirmations.

In relation to the interpretation of treaties, counsel for the respondents reminded us of the well-known observation of Lord Russell, C.J., in *Re Arton*(No.2) (1):

'In my judgment these treaties ought to receive a liberal interpretation, which means no more than that they should receive their true construction according to their language, object and intent.'

In *R. v. Governor of Pentonville Prison, ex parte Ecke* (2) Lord Widgery, C.J., after reciting that part of the judgment of Lord Russell referred to above, emphasised that an extradition treaty is not to be construed as though it were a domestic statute. He said:

(1) 60J.P.132; [1896] 1 Q.B. 509

(2) [1974] Crim. L.R. 102

'The words used in a treaty of this kind are to be given their general meaning, general to lawyer and layman alike. They are to be given, as it were, the meaning of the diplomat rather than the lawyer, and they are to be given their ordinary international meaning and not a particular meaning which they may have attracted in England or in certain branches of activity in England.'

Bearing in mind that the 1873 Act came into effect before the Order in Council and further that one of the intents of the treaty was to avoid the necessity of bringing witnesses from overseas, I consider that a justifiable liberal interpretation of the treaty involves construing the words 'sworn depositions or statements of witnesses' as extending to affirmations. I therefore turn to the second submission, namely that the statements of the four accomplices did not amount to affirmations.

Under s.186 of the Norwegian Penal Code an oath must not be taken by a witness who has been found guilty of the act or guilty of complicity in the act which is the subject of the investigation or who is under suspicion of such guilt. Thus there could be no question of any of the four accomplices taking the oath. All four alleged accomplices were willing to give evidence. What took place in each case was that their previous statements, or one or more of them, was read and each accepted before the court that it was accurate, subject in one case to certain corrections. These verbal acceptances were dictated by the judges into the court record which was then signed by these witnesses.

It is provided by s.168 of the Norwegian Penal Code that:

'Anybody who by false accusation, report, or testimony before a court, the prosecution or any other public authority, by distortion or removal of evidence or by establishment of false evidence, or otherwise against his better conscience, attempts to cause somebody else to be charged with or convicted of an offence, or is accessory thereto, shall be punished by imprisonment from six months to eight years if the offence concerned is a felony, and by imprisonment up to four years if the offence is a misdemeanour.'

Within two to three days of giving their evidence it was apparently thought desirable by the authorities to remind the alleged accomplices of the provisions of this section. They were accordingly brought back before the judge and informed of the terms of the code. Three of them stated that in giving their evidence they were each aware that they would be liable to punishment if they gave 'perjurious evidence in court.' One of the Indians, Mr. Hardial Singh, declared that he did not know of the provision when he gave his evidence, but declared that his evidence would be the same even if he had known of the provision. He repeated that he had told the whole and full truth.

Counsel for the applicant submits that there are three requirements for a valid affirmation: (i) a solemn undertaking has to be given to the judicial authority; (ii) it must be given prior to the giving of evidence to the court; (iii) the undertaking ought to include some reference to a promise to tell the truth, however expressed.

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The right to affirm was introduced in 1838 for the benefit of Quakers and Moravians and the essential part of the declaration is still retained today, namely 'I . . . do solemnly, sincerely, and truly declare and affirm . . .' Although neither party suggests that this or any closely comparable formula has to be used, it is agreed that the mere signature to a document or the verbal acknowledgment that its contents are correct cannot amount to an affirmation. Where then is the line to be drawn?

The answer cannot be precise: it must be a matter of fact and degree dependent on the particular circumstances of the case. I do not consider that the affirmation need take place prior to the making of the statement. What is required, where the statement has been made, is its adoption in circumstances which recognise the gravity and importance of the truth being told on the particular occasion. I would not necessarily accept that the mere acknowledgment, albeit before a judicial authority, that what has been previously said is the truth would amount to an affirmation. But in this case the acknowledgment before the judicial authority was made after the terms or the substance of s.168 of the Norwegian Penal Code was drawn to the attention of each of the alleged accomplices. The fact that the provisions of this section were not drawn to their attention initially when they appeared before the judge does not seem to me, in the circumstances of this case, to make any material difference. They were brought back before the court within a very short time of their initial appearance and their subsequent acknowledgment in the circumstances which I have described of the truth of what they had previously said amounted, in my judgment, to a sufficient acknowledgment.

It is conceded that, if the evidence of the alleged accomplices was properly before the Chief Metropolitan Stipendiary Magistrate, there was sufficient evidence to justify his conclusion that a *prima facie* case had been made out by the Norwegian government. I would accordingly dismiss the appeal.

SKINNER, J: Of the four submissions made so clearly by counsel for the applicant and referred to by Ackner, L.J., I need only consider two.

The first is that the committing magistrates can only act on sworn testimony in deciding whether the evidence is such as would, in the words of s.10 the Extradition Act, 1870,

"according to the law of England justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England . . ."

This argument depends first on the 1873 treaty (Order in Council date 30th September, 1873) and, in particular, on art X which provides that

"the authorities of the State applied to shall admit as entirely valid evidence the sworn depositions or statements of witnesses taken in the other State, or copies thereof."

Any domestic legislation has to be read in the light of those words. The relevant domestic legislation lies in the Oaths Act, 1838, Lord Brougham's Act 1850, s.14 of the 1870 Act, and s.4 of the Extradition Act, 1873, to all of which Ackner, L.J., has already referred. Counsel for the applicant submits that, however inconvenient or out of date it might be, and whatever the position may have been in English law either in 1873 or now, sworn statements alone can be received.

Counsel for the respondents concedes that the treaty is the determining factor. He relies on the well-known words of Lord Russell, C.J., in *Re Arton* (No.2) (1)

"treaties ought to receive a liberal interpretation, which means no more than that they should receive their true construction according to their language, object and intent."

Lord Widgery, C.J., in *R. v. Governor of Pentonville Prison, ex parte Ecke* (2) helpfully put the correct approach in the following words:

"The words used in a treaty of this kind are to be given their general meaning, general to lawyer and layman alike. They are to be given, as it were, the meaning of the diplomat rather than the lawyer, and they are to be given their ordinary international meaning and not a particular meaning which they may have attracted in England or in certain branches of activity in England."

Counsel for the respondents asks us to look at this treaty in the light of events at the time it was signed and ratified. It was concluded on 26th June, 1873. On 5th August, 1873, the Extradition Act 1873, received the royal assent, thereby widening the scope of s.10 of the 1870 Act to include affirmations despite the fact that the English courts could only hear affirmed evidence if given by a Quaker or Moravian. On 28th August, 1873, the treaty was ratified. Lord Brougham's Act, though not directly relevant to interpretation of the treaty, had been in force for nearly a quarter of a century. In the light of this, what is the general meaning, general to lawyer and layman alike, of 'sworn depositions or statements of witnesses' in the treaty? Does it include an affirmation? In my judgment it does.

Thus counsel's argument for the respondents succeeds on the first point, and as to the second he concedes that, to be within the treaty, the evidence submitted must either be on oath or affirmation; unsworn or unaffirmed evidence cannot be received.

That brings me to counsel's second submission for the applicant that the crucial statements in this case, namely, those given by four alleged accomplices of the applicant, were not affirmations. What is meant by an affirmation in this context? Ackner, L.J., has recited what in fact occurred in the Norwegian court and the relevant sections of the Norwegian Penal Code. The difference between the parties is a narrow one. They agree (a) that an affirmation need not follow the

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- (1) 60 J.P. 132; [1896] 1 Q.B. 509
(2) [1974] Crim. LR 102

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wording of the Oaths Act, 1838 (which has remained unchanged since that date), (b) that there must be a solemn undertaking given to the court to tell the truth. Counsel for the applicant would add (c) that it ought to contain a promise to tell the truth, (d) that the promise ought to be given before the evidence is recorded.

In my judgment, there has been some confusion caused by failure to differentiate between the verb 'to affirm' and the noun 'affirmation'. Within the context of the Extradition Act, 1873, an affirmation must be a document like a deposition or statement on oath (see Donaldson, L.J., and Hodgson, J., in *R. v. Twena* (3)). I do not accept counsel's submission on this point that that court wrongly made a differentiation. In my judgment the document put forward as an affirmation must contain, or show on its face, a solemn declaration by the witness before a judicial authority that its contents are true. The document might consist of a record of what the witness had said or might refer to a record of something said on another occasion and acknowledged or adopted in solemn form before the judicial authority. The vital constituent is the solemn declaration of the truth, which might be expressed in a number of different ways. For example, in the present case the reference in the case of each witness to s.168 of the Norwegian Penal Code clearly emphasises the solemnity of what the witness is adopting and accepting in the document.

Here, each of the witnesses appeared in court before a judge on 20th or 21st May, 1980. Norwegian law precluded an accomplice from taking the oath. Each was informed of his right to refuse to give evidence. He then accepted or confirmed earlier statements he had made and this was recorded. The two Indian witnesses are both recorded as saying that their statements were in accordance with the truth. On 23rd May, because it was felt that perhaps all the formalities had not been observed, each was brought back to the court before the judge and informed (in one case) and reminded (in the other three cases) of the provisions of s.168. The three 'reminded' all said that they had been aware of the section at the previous hearing. The one 'informed' said that, had he been aware, he would have given the same evidence and it was the truth. In order to decide whether there was an affirmation in any particular case, the documents recording the witnesses' evidence have to be looked at as a whole. Doing so here, I have no hesitation in saying that, in each of these cases, the documents reveal a solemn declaration, reinforced by penal sanctions, that their contents are true and they amount to affirmations within s.4 of the 1873 Act. For these reasons I agree that this application should be dismissed.

Solicitors: Hallinan, Blackburn Gittings & Co; Director of Public Prosecutions.

Reported by G.F.L. Bridgman Esq., Barrister.

(3) not reported

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JUSTICE OF THE PEACE AND LOCAL GOVERNMENT REVIEW REPORTS, 1981

EDITOR:

G. F. L. BRIDGMAN, Esq., O.B.E., of the Middle Temple, Barrister.

145 J.P.

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Finnigan v. Sandiford, Clowser v. Chaplin	HL	440
ROAD TRAFFIC — Causing death by reckless driving — "Reckless" — Direction to jury — Road Traffic Act, 1972, as substituted by s.50(1) of the Criminal Law Act 1977.		
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ROAD TRAFFIC — Disqualification of driver — Convictions within preceding three years — Endorsement of second conviction later than three years period — 'Totting-up' provisions of Road Traffic Act, 1972, s.93(3).		
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ROAD TRAFFIC — Driving with blood-alcohol concentration above prescribed limit — Need for provision of a specimen of breath for a breath test at a police station and the provision of a sample of blood or urine all to take place at the same police station — Road Traffic Act, 1972, s.6(1).		
Pascoe v. Nicholson	HL	386
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Pascoe v. Nicholson	HL	386
THEFT — See Criminal Law		
TRIAL . See Criminal Law		

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Telephone: Byfleet 43172

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WHEN CLIENTS seek advice about making legacies or bequests to deserving organisations, please mention the good work being done by Reed's School, and its need for £50,000 each year to maintain and extend its activities.

REEDS SCHOOL is an independent boarding school for boys, with full provision for Sixth Form work. GENEROUS BURSARIES (which can amount to as much as the full fees) are awarded to boys who enter as Foundationers. These special bursaries are available to boys who have lost a parent, have one parent incapacitated by ill health, or whose parents have separated.

THE SCHOOL is situated at Cobham, Surrey, in a pleasant environment of heath and woodland, with excellent facilities for games, and has recently been completely modernised. It can offer much to boys whose home life has been difficult, and for whom a boarding school education is of particular value.

BUT A GREAT DEAL OF MONEY is needed to carry on this very valuable work, and the help of Solicitors would be especially appreciated.

FURTHER DETAILS about the work of the School will be gladly supplied by the Secretary.

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For further details on the Marwell Preservation Trust general fund and deeds of covenant please write or phone, quoting reference JP.

Marwell Preservation Trust, Marwell Zoological Park,
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Telephone: Owslebury 406. Charity Registration Number: 275433
Marwell Zoological Park is open every day of the year from 10 a.m.



Marwell

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The Society has been caring for old people since its foundation in 1905 and the demand for its help is still increasing. It gives assistance to the sick and lonely in acute need and runs eleven homes for 400 men and women of similar background, where nursing care is promised to every resident and is available, if necessary, to the end of their lives. We depend so much on

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Registered Charity No. 226064



ANIMAL DEFENCE SOCIETY LTD.

ANIMAL DEFENCE TRUST (Reg. Charity No. 263095)



Photo: Ruth R. Murray

Animal Defence Centre
Ferne
Nr. Shaftesbury, Dorset

Tel: Donhead 661

Field Study Centre
Laughter Hole Farm
Postbridge
Yelverton, Devon

Tel: Tavistock 88265

The object of both the Animal Defence Society and the Animal Defence Trust is to protect animals from cruelty and suffering and to promote humane behaviour towards animals. The Trust's Rescue and Rehoming Schemes help the injured and unwanted and take into care wild and domestic animals in need. Two sanctuaries are maintained for wildlife rescue, care and rehabilitation.

HELP THOSE WHO CANNOT HELP THEMSELVES

YOUR SUPPORT is constantly needed to extend the work of the
ANIMAL DEFENCE SOCIETY/TRUST

Please send a donation to the Animal Defence Society Ltd and remember the Animal Defence Trust when discussing charitable bequests.

THE CIVIL SERVICE BENEVOLENT FUND

For nearly 100 years, the Civil Service Benevolent Fund has helped Civil Servants when illness or domestic misfortune reduces their income or leads to premature retirement. Help is also given to retired staff, widows and dependants. The Fund has its own Convalescent Centre at Bournemouth and 7 Residential Homes for those with disabling illness or who are infirm due to old age.

Civil Servants themselves, by voluntary contributions, provide the greater part of the income needed to continue helping colleagues who have given many years of service to the public.

DONATIONS AND LEGACIES will be welcome, particularly from those who have relatives in the Civil Service, to assist the Fund to expand the convalescent facilities and provide more residential homes.

Further information may be obtained from Miss I R Brotherwood, Deputy General Secretary, Civil Service Benevolent Fund, Watermead House, Sutton Court Road, SUTTON, Surrey, SM14TF.



THE LEONARD CHESHIRE FOUNDATION



Leonard Cheshire House,
26-29 Maunsel Street, London SW1P 2QN. Telephone: 01-828 1822
Patron: Her Majesty The Queen
Founder: Group Captain G. L. Cheshire, V.C., O.M., D.S.O., D.F.C.
(Regd. Charity No. 218186)

Cheshire Homes provide residential care for physically or mentally handicapped adults and children, hostels for ex-psychiatric rehabilitation and attendant care schemes for disabled people living in their own homes. The United Kingdom section of the Foundation currently consists of 75 Homes and Hostels and there are 115 Homes in 36 countries overseas. It is estimated that in excess of 5,000 people are being cared for by the Foundation as a whole; yet the need is so great that

no one would claim that this more than scratches the surface of the problem. Last year more than 1,000 applicants were turned away in the UK alone, and money is urgently required for the enormous amount of work which remains to be done. **Donations, covenants and legacies** may be given to the Foundation for the Trustees to use wherever the needs are greatest; or, if preferred, they can be given for any Home specified by the donor, or to your local Cheshire Home.

The Metropolitan Police Combined Benevolent Fund

The Metropolitan Police Combined Fund is a Registered Charity (No. 268936) which receives donations or legacies from the public, and voluntary subscriptions from serving Metropolitan Police Officers for the relief of distress due to death, illness, injury or other causes among members of the Force, including cadets, ex-members of the Force, widows and orphans.

The total income is distributed by monthly grants, in proportions determined annually by the Trustees to the following Funds:

Metropolitan & City Police Relief Fund

Metropolitan Police Widows' Fund

Metropolitan Police Special Widows' Fund

Metropolitan & City Police Orphans' Fund

Metropolitan Police Seaside Home Maintenance Fund

all of which are also Registered Charities. Each is controlled by a Board of Management empowered to make grants in cases where evidence of need is established, with the approval of the Trustees. The Trustees are also empowered to make grants to such other Metropolitan Police Charitable Funds as may exist from time to time.

Donations, legacies or enquiries should be addressed to:

Metropolitan Police (D2 Branch), 10 Broadway, London SW1H 0BG

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A donation, bequest or legacy will help us a great deal.

Meanwhile, we would be pleased to send you full information.

Contact Martin Oliver, National Star Centre for Disabled Youth, 103 The Promenade, Cheltenham, Glos GL50 1PE. Tel Cheltenham 24478.

Regd. Charity No. SS 220239/A1/GEN
Chief Patron, HRH The Duchess of Kent.



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Money is needed to provide the facilities for them to continue and extend their work. Boys' Clubs are investing in the future. Why don't you invest with us and together we can watch our investment grow.

National Association of Boys' Clubs

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Please send to the Director, FAMILY WELFARE ASSOCIATION, 501 Kingsland Road, London E8 4AU. Telephone: 01-254 6251 Registered Charity No. 264713



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124 Sloane Street, LONDON SW1X 9BP

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